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In the

Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS L. GOLDSTEIN, COMPTROLLER OF THE TREASURY OF THE STATE OF MARYLAND; AND STATE OF MARYLAND; THE OVERBROOK EGG NOG CORPORATION, A MARYLAND CORPORATION; AND HEUBLEIN INC., A CONNECTICUT CORPORATION,

Petitioners,

vs.

G. WILLIAM MILLER, SECRETARY OF THE TREASURY AND G. R. DICKERSON, DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners, Louis L. Goldstein, Controller of the Treasury of the State of Maryland; The State of Maryland; The Overbrook Egg Nog Corporation, a Maryland Corporation, and Heublein Inc., a Connecticut Corporation, respectfully petition this Court for a Writ of Certiorari to review the final judgment of the United States District Court for the District of Maryland, wherein judgment was entered in favor of the defendant. Further said judgment denied the relief sought by the petitioners to permanently enjoin the enforcement of 27 C.F.R. Section 201.540b which prohibited and invalidated that portion of a Maryland regulation which authorized the use of the metric equivalent of a four ounce standard of fill of alcoholic beverages in intrastate commerce.

QUESTIONS PRESENTED FOR REVIEW

This Petition presents for review the following questions relating to competing federal and state regulations which pursuant to a federal scheme purports to prohibit a state from permitting by its regulation a use of the metric equivalent of a four ounce standard of fill (118 milliliter) for intrastate commerce purposes only.

1. Whether or not the taxing power under Article I, Section 8, Clause 1 of the United States Constitution can be exercised without regard to a constitutional amendment or federal statute in such a manner so as to prohibit a state from adopting a permissive regulation which pertains solely to raising revenue and regulating commerce within a state.

2. Whether under the United States Constitution the federal taxing power under Article I, Section 8, Clause I automatically pre-empts the Twenty-First Amendment as it relates to conduct of a state involving the sale,

distribution and use of alcoholic beverages solely within its borders.

3. Whether or not the taxing power under Article I, Section 8, Clause I of the United States Constitution is subject to the same restraints as the commerce power under Article I, Section 8, Clause 3 of the United States Constitution with respect to what are entirely intrastate activities authorized pursuant to Section 2 of the Twenty-First Amendment of the United States Constitution.

PARTIES

The parties in this case are as follows:

1. Petitioners herein are as follows:

   a. Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland; and the State of Maryland.

   b. The Overbrook Egg Nog Corporation, a Maryland corporation.

   c. Heublein, Inc., a Connecticut corporation.

2. Respondents herein are as follows:

   a. G. William Miller, formerly Secretary of the Treasury; and G. R. Dickerson, Director of the Bureau of Alcohol, Tobacco and Firearms.

Opinion Below

The Opinion of the United States Court of Appeals for the Fourth Circuit is officially reported as *Goldstein* v. *Miller,* 488 F. Supp. 156 (1980) and is reprinted herein as Appendix A. The Opinions of the United States District Court for the District of Maryland which was adopted by the United States Court of Appeals for the Fourth Circuit are reprinted herein as Appendices C and D.

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 3, 1981 and is set forth in the above opinion of the Fourth Circuit Court of Appeals and reprinted herein as Appendix A. A timely Petition for Rehearing filed by the Overbrook Egg Nog Corporation and Heublein, Inc., before the United States Court of Appeals for the Fourth Circuit, was denied on March 4, 1981. The Order of denial is reprinted herein as Appendix B. This Petition for Certiorari was filed within 90 days of that date. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

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Constitutional and Statutory Provisions

This case involves the following constitutional and statutory provisions, which provide as relevant:

U.S. Const. art. 1, §8, cl. 1 (Taxing Power):

> "The Congress shall have Power to lay and collect taxes, duties, imposts and excises. . ." 2, 3, 4, 7, 8, 9, 12, 14, 19

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U.S. Const. art. 1, §8, cl. 3 (Commerce Power)

"The Congress shall have power . . . to regulate commerce with foreign nations and among the several states. . ." 2, 3, 4, 7, 8, 10, 12, 18, 19

U.S. Const. amend. XXI, §2:

"The transportation or importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited". 2, 3, 4, 6, 8, 9, 12, 14, 15

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I.

STATEMENT OF THE CASE

The per curiam decision of the Court of Appeals which upheld the lower Court Opinion, invalidating a state regulation, involves a conflict between competing federal and state regulations, whereby the federal regulation specifically prohibits the intrastate bottling of a 4 ounce (118 milliliter) standard of fill, which is permitted under

a State of Maryland Regulation for use solely within the State.

On March 10, 1976, the Respondent Treasury amended 27 CFR Part 5, 5.47(a), and converted standards of fill from English to metric measurements, thereby reducing the number of bottle sizes from ten to six, applicable only to interstate or foreign commerce. (App. F. p. 50a.) The 4 ounce (118 milliliter) standard of fill is not one of the six metric sizes, nor was it one of the ten authorized English sizes prior to the amendment. The regulation was promulgated under the authority of the Federal Alcohol Administration Act, 27 USC 205(e), which is jurisdictionally applicable to interstate and foreign commerce only. (App. E. p. 49a)

In order to conform certain housekeeping and record-keeping regulations to Regulation 27 CFR Section 5.47(a), the Treasury, on October 26, 1976, also amended 27 CFR 201.540b, purportedly pursuant to a taxing statute, 26 USC Section 5301, 41 Fed. Reg. 46859. Amended Regulation 201.540b, which is the core of this dispute, adopted the metric standards of fill by reference to Section 5.47(a), and further provided an exception to permit the use of 4 ounce liquor bottles until December 31, 1979, for the packaging of distilled spirits for sale in intrastate commerce only. (App. F. pp. 50a-51a)

The State of Maryland has permitted, and Overbrook has bottled a 4 ounce (118 milliliter) standard of fill for distribution and sale in the State of Maryland since 1950, without interference or objections by the Treasury.

Pursuant to the pervasive system of regulation delegated to the states under the Twenty-First Amendment, each of the fifty states throughout the country have and continue to exercise authority and regulatory control over authorized standards of fill. Prior to the adoption of

metrication, the state's control ranged from prohibiting certain of the ten authorized standards of fill under Section 5.47(a), to permitting certain standards of fill not authorized under Section 5.47(a), i.e., "Maryland 4 ounce (118 milliliter) standard of fill". In either event, the respondents took no action, express or implied, administrative or judicial, to prevent Maryland or any other state from permitting their own authorized standards of fill for purposes of intrastate commerce until the adoption of 27 CFR 201.540b.

Effective November 16, 1979, pursuant to Md. Ann. Code Art. 2b Sec. 184-185, the State of Maryland amended 6 (Comar. 01.02.01.06), which amendment adopted the standards of fill for distilled spirits authorized by the Treasury and further permitted and extended the use of a 118 milliliter (4 ounce) standard of fill in the State of Maryland for intrastate purposes only. (App. F. p. 50a.) The State argued that as in the case of "commerce" regulations, so too, "taxing" regulations must be balanced against the respective interests of the federal and state governments.

On November 20, 1979, Petitioner Louis L. Goldstein, Comptroller of the Treasury of the State of Maryland ("State" hereafter) and the Petitioners, the Overbrook Egg Nog Corporation ("Overbrook" hereafter) and Heublein, Inc. ("Heublein" hereafter) filed separate Complaints for Declaratory and Injunctive Relief before the United States District Court of Maryland, pursuant to 28 USC 1331, 1332, 1343 and 1346. Each of the Complaints petitioned the Court to declare that the respondents, G. William Miller, Secretary of the Treasury, and G. R. Dickerson, Director of the Bureau of Alcohol, Tobacco and Firearms ("Treasury" hereafter) did not possess the power to prohibit by regulation the State of Maryland from permitting by regulation, the metric

equivalent of a 4 ounce standard of fill, intended to be sold to wholesalers, retailers and consumers solely within the State of Maryland. The Complaints also sought injunctive relief prohibiting the Treasury from enforcing the contested federal regulation in the State of Maryland.

On December 7, 1979 the parties filed an Agreed Statement of Facts, which set forth the intrastate character of the activity which was being prohibited under the federal regulation, thus dispelling any notion as to interstate commerce. The agreed upon facts establish that Overbrook has bottled distilled spirits in 4 ounce (¼ pint) containers since 1950; the bottling process takes place at Overbrook's plant in Baltimore, Maryland; the alcoholic liquor contains labels which state that the bottles are for sale in the State of Maryland only; the alcoholic liquors after they are bottled, labeled and capped, are stored at Overbrook's plant in Maryland until picked up by Maryland distributors for distribution to Maryland retailers. (App. D. p. 20a)

Based upon a stipulation of counsel for the respective parties, the lower Court entered an Order staying the implementation, force and effect of federal regulation 27 CFR Part 5, Sec. 5.47(a) and 27 CFR 201.540b. On February 29, 1980, the lower Court filed an Opinion and entered an Order granting judgment in favor of the Defendants which effectively invalidated Maryland's Regulation which permitted use of a 4 ounce standard of fill. (App. D. p. 16a.) In so doing, the Court conluded that contrary to the Commerce Clause, the Twenty-First Amendment is pre-empted by the taxing powers and may be exercised to prohibit a state from permitting an activity solely within its borders, wherein the Court stated: (App. D. p. 28a.)

> ". . . . By way of contrast, it is to be noted that federal regulations, resting in part upon the com-

> merce power, have been held to violate the Twenty-First Amendment, when they conflict with state regulations".

and the Court further stated: (App. C. p. 11a.)

> "Even assuming arguendo, that if the federal prohibition were grounded on the exercise of the commerce power, it would violate the State's authority under the Twenty-First Amendment, there is no authority for holding that the amendment restricts the otherwise valid exercise of the taxing power by the federal government to prevent something a state desires to permit . . ."

and the Court further stated: (App. C. p. 11a.)

> "So that any confusion will be totally eliminated, this Court, at this time, does explicitly 'reach the question of whether the taxing power can be exercised with respect to what are entirely intrastate transactions', (emphasis in original)' and answers that question in the affirmative. In so doing, this Court notes the distinction between the exercise of the taxing power and the commerce power".

On March 14, 1980, the Petitioners, Heublein and Overbrook filed a Notice of Appeal from the final judgment to the United States Court of Appeals for the Fourth Circuit, No. 80-1327 and on March 20, 1980, Petitioner, Louis L. Goldstein, and the State of Maryland filed a Notice of Appeal from said judgment to the United States Court of Appeals for the Fourth Circuit, Appeal No. 80-1326, which by Order of the Fourth Circuit, were consolidated for purposes of briefing and oral argument.

On April 25, 1980, the lower Court filed an additional Opinion and stayed the order of February 29, 1980, pending appeal before the Fourth Circuit. (App. C. p. 4a)

The Petitioners argued before the Appellate Court that the competing interests were to be resolved in favor of

the Twenty-First Amendment, and that Regulation 201.-540b must fall for three reasons.

First, the regulation is beyond the scope of the Statute. Regulation 201.540b was purportedly promulgated under the statutory authority of 27 USC Section 5301, which, on its face, does not grant any authority to the Secretary or his delegate to prohibit the fill of alcohol to be placed in a container for use solely in intrastate commerce. The authority to determine standards of fill is expressly set forth at 27 USC Section 205(e) of the Federal Alcohol Administration Act and is jurisdictionally limited to interstate commerce. Secondly, Regulation 501.540b is not reasonably or in any way related to the protection of revenue. Thirdly, assuming only for purposes of argument that there is statutory authority and that there is a reasonable relationship, then the regulation is in direct conflict with that of Maryland and must fall based upon a balancing of the purported interest of the federal government and the longstanding state interest of Maryland and other states in the regulation of standards of fill for use within its borders. Said state's interest being the protecting of its express constitutional authority under the Twenty-First Amendment, the protecting and preserving of the revenue which it derives from regulating the distribution and use of alcoholic liquor within its borders, together with the preservation and protection for the taxpayer of a longstanding access to alcoholic beverages in convenience and reasonably priced quantity.

On February 3, 1981, the judgment of the United States Court of Appeals was entered per curiam affirming and adopting the opinion of the lower Court. A timely Petition for Rehearing was filed and denied by the Court on March 4, 1981 and the filing of the mandate stayed pending filing of this Petition for Certiorari. (Apps. A & B)

REASONS FOR GRANTING THE WRIT

A. PRELIMINARY STATEMENT

For each of the following reasons, a Writ of Certiorari should be issued in this case to decide an important question of federal law, which has not been, but should be settled by this Court.

The validity of competing interests under the federal taxing power and Section 2 of the Twenty-First Amendment has never been before this Court. The lower Court erroneously invalidated that portion of Maryland's Regulation, which permits the intrastate use of a 118 milliliter standard of fill, on the basis that Section 2 of the Twenty-First Amendment is pre-empted by the federal taxing powers, and may be used to prohibit commerce within a state, without being subject to the same balancing test, applicable to conflicting enactments, adopted under different provisions of the Constitution.

Therefore, under the guise of the taxing powers, the Treasury, by regulation, could restrict commerce within a State and prohibit a State from taxing alcoholic liquor products, thereby jeopardizing the State's ability to regulate and tax alcoholic beverages. To permit the lower Court's construction of taxing powers to stand would destroy the further ability of the fifty States to regulate alcoholic beverages and will lead to further confusion, as to the delicate relationship between federal and state control over the alcoholic beverage industry.

Thus, the paramount issue, which should be reviewed by this Court is the unbridled discretion exercised by the lower Court in reaching its holding; that a federal administrative agency acting under the guise of the constitutional power to tax is not limited in its actions by any other constitutional provision.

B. THE HOLDING OF THE LOWER COURT IS IN CONFLICT WITH THIS COURT'S DECISIONS UNDER THE CONSTITUTIONAL POWER TO TAX.

The lower Court conceded that federal regulations, resting in part upon the commerce power, have been held to violate the Twenty-First Amendment when they conflict with state regulation. Thus acknowledging that the competing interests should be subject to a "balancing test". However, in the case of the taxing powers, the Court below stated:

> ". . ., [T]here is no authority for holding that the amendment restricts the otherwise valid exercise of the taxing power by the federal government to prevent something a state desires to permit." (App. D. p. 40a.)

Thus, the lower Court erroneously finds that the Twenty-First Amendment is pre-empted by the taxing powers, and rejects a balancing test in the case of competing regulations. The powers of Congress are not without restriction or isolated from other Constitutional provisions or legislative enactments. No act of Congress or regulation of any agency is isolated or independent of the Constitution or other commands. *Haynes* v. *U.S.*, 390 U.S. 85, 98 (1967):

> "We do not doubt, as we have repeatedly indicated, that this court must give deference to Congress' taxing powers, and to measures reasonably incidental to their exercise; but we are no less obliged to heed the limitations placed upon those powers by the Constitution or other commands".

As recently as 1973, in *National Railroad Passenger Corp.* v. *Miller*, 358 F.Supp. 1321, (1973), affirmed on appeal from D.C. Kan. 414 U.S. 948 (1973), this Court affirmed the holding of the Circuit, which stated:

"Before a federal law may pre-empt state legislation, the federal statute must be free from constitutional infirmity. Constitutional amendments limit the power of Congress, as well as that of the states, when so considered".

So, too, enactments of Congress under the guise of taxing powers have been balanced against other powers of Congress, Constitutional amendments and matters of local interest. See *United States* v. *Butler,* 297 U.S. 1 (1935). See also *Child Labor Tax Case,* 259 U.S. (1922); *Hill* v. *Wallace,* 259 U.S. 44 (1921); *Nebbia* v. *People of the State of New York,* 291 U.S. 502 (1933); *Marchetti* v. *United States,* 290 U.S. 39 (1967); *United States* v. *Constantine,* 296 U.S. 287 (1935); *Collector* v. *Day,* 78 U.S. (11 Wall) 113 (1870). In each of these cases, this Court held that the federal taxing power could not be applied so as to interfere with state functions.

The means of instrumentalities employed by the States for carrying on the regulation of alcoholic beverages, under the Twenty-First Amendment while preserving their existence in fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired. They should not be liable to be crippled, much less defeated by the taxing powers of the federal government.

Petitioners have pointed out that, historically, the determination of standards of fill have been limited to interstate and foreign commerce, and, pursuant to the pervasive system of regulation, delegated to the states under the Twenty-First Amendment, Maryland, as well as each of the other states throughout the country, have and continue to exercise authority and regulatory control over standards of fill for intrastate purposes.

Based upon the contention of the respondents, petitioners have argued that the Treasury's attempt to regulate standards of fill for intrastate commerce is not reasonably related to taxing powers.

The lower Court and the Court of Appeals by its per curiam decision in ruling to the contrary relied heavily upon the legislative history which led to the adoption of Regulation 201.540b in 1968, and its subsequent amendment in October 26, 1976, starting with the act of June 18, 1934, 48 Stat. 1020, which as amended is now set forth under Section 5301 of the Internal Revenue Code, 1954. The scant Congressional Record referred to by the Court does not support the Court's ruling and actually reflected conditions which existed during prohibition and focuses upon unlicensed manufacturers producing and distributing untaxed liquor (moonshining and bootlegging). This illicit trade was directed to production, misbranding, fake labels, re-use and refilling of the same bottles and did not pertain to the amount of the fill (tax paid alcoholic beverage) in a container.

The emphasis of the statute was the issuance of permits to regulate the manufacture and distribution of liquor, the re-use, refilling and resale of containers, once they have been used and the maintaining of proper records for inspection and filing reports. Moreover, the direct impact of the statute was to set up a system or method designed to prevent illicit production of non-tax paid liquor by illicit, unlicensed manufacturers. (App. E. p. 48a). So too, the determination of standards of fill at the time the act of June 18, 1934 was adopted, rested with the Federal Alcohol Control Administration, and not the Internal Revenue Department.

The lower Court rather than the record, attempted to justify the purpose for adoption of Regulation 201.540(b).

On Page 27 of its Opinion, the Court attempts to construct a protection of revenue argument relative to the federal regulation, by stating as follows: (App. D. p. 44a)

> "Rather, Defendants, indicate that restriction of standards of fill to certain sizes will 'ensure' that legal liquor bottles are easily recognizable by their sizes, brandings and markings . . .
> The Treasury Department . . . continues to believe that in order to protect the revenue, it is necessary to have a limited number of consistent and uniform sizes".

This discussion is then followed on page 27 by the Court's footnote, which is a dialogue that took place during oral argument on these cases on January 14, 1980, wherein the Court asked: (App. D. p. 44a.)

> "If the federal government had to deal with one thousand more different sized bottles, it would make it more difficult to check back (for proper tax payments), wouldn't it?"

The Court went on to say:

> "If this court were to permit the use of 118 milliliter bottles in these cases, the reasons for so doing could be equally applicable in future cases in which other plaintiffs sought to use one or more additional bottle sizes".

First, it should be pointed out that these purported revenue reasons are advanced by the Court, and are not reasonably related to the taxation of alcoholic beverages. Secondly, the Court has confused a consideration of standards of fill to a consideration of bottle shapes. This is fallacious since different shaped bottles can contain the same amount of liquid. Standards of fill pertain more specifically to the amount of liquid contained in a bottle,

The lower Court is of the belief that by having only six standards of fill, the result would be six bottles identically shaped. This is not the case. For example, a bottle can contain one liter of liquid by volume—however, the bottle can be shaped long, short, wide, thin. In addition, alcoholic liquors are marketed in specialty bottles, i.e., trophy bottles, fancy bottles, gift bottles, decanters and the like.

The reasons advanced by the court are further unsupported by facts because both the Internal Revenue Code and Regulations under 27 C.F.R. Part 201 (superseded by Part 19, effective 1/1/80), set up a very elaborate and detailed tax collection system, which imposes the federal tax on the substance, as soon as it is in existence, and is assessed and measured by gallonage, *not liters.* The federal tax as to distilled spirits is imposed upon the distillation process, not standards of fill and not the sale. 27 U.S.C. 5001(a). On page 28 of its 2/29/80 Opinion, the lower Court is of the incorrect belief that beginning January 1, 1980, "liquor is to be taxed in the bottle". (App. D. p. 45a.) The obligation to pay the federal tax is created as soon as the distilled spirits come into existence, 27 U.S.C. 5001(b). The tax becomes a first lien on the spirits from the time the spirits come into existence, at the distillery, 27 U.S.C. 5004. Liability for the tax is set forth under 27 U.S.C. 5005, and all taxes are paid by the petitioners prior to the time the distilled spirits are shipped in bulk into the State of Maryland for bottling, distribution and sale. Therefore, the actual standard of fill and even the actual size of the bottle have nothing to do with the amount or collection of revenue.

In summary, there does not exist any relationship between the protection of revenue and regulation 201.540b which prohibits the use of a 118 milliliter standard of fill in intrastate commerce, because all taxes are paid prior to the time the product is shipped in bulk into the State of Maryland. In effect, the Department of Treasury is seeking to regulate commerce by the imposition of uniform standards of fill, and more specifically, seeking to regulate intrastate commerce.

Thus, we have the power to tax being used to reach a federal end which would properly be a prohibited result under the commerce powers. This Court has rejected the use of the taxing power to promote said objectives. If indeed no revenue purpose can be shown, it seems clear that the fact that they are imposed in the context of an otherwise valid taxing measure would not be enough to establish their validity. *Haynes* v. *U.S.*, 390 U.S. 85 (1968). This Court in *United States* v. *Butler*, 297 U.S. 1 (68-69)(1935) rejected adoption of the Agricultural Adjustment Act under the power to tax on the basis it attempted to regulate purely local activities.

Care has been taken by this Court in other cases to point out that various requirements imposed by taxing statutes must be supportable as an aid of a revenue purpose. *Sonzinski* v. *U.S.*, 300 U.S. 506, 513 (1937), *Marchetti* v. *United States*, 209 U.S. 39 p. 58 (1957).

To permit the lower Court's construction of taxing powers to stand would be to destroy the state government in effectuating its enumerated powers.

C. THE HOLDING OF THE LOWER COURT IS IN CONFLICT WITH THIS COURT'S DECISIONS RELATIVE TO "BALANCING" THE COMPETING FEDERAL AND STATE INTERESTS RELATIVE TO ENACTMENTS UNDER SECTION 2 OF THE TWENTY-FIRST AMENDMENT.

This Court has, throughout the years, consistently balanced the competing federal and state interests, as it pertains to enactments under Section 2 of the Twenty-First Amendment, and has given "wide latitude" to state liquor regulations; *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (March 3, 1980).

Upon reviewing competing interests under the federal commerce power, and Twenty-First Amendment, this Court observed in *Midcal, supra*:

> The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a concrete case. *Hostetter* v. *Idlewild Liquor Corp.*, 377 U.S., at p. 322". 445 U.S. at 110.

In *State Board* v. *Young's Market Co.*, 299 U.S. 59 (1936), a state imposed license fee was upheld for interstate imports of alcohol; a state law restricting the types of liquor that could be imported from other states was deemed valid in *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401 (1938); and in the cases of *Finch & Co.* v. *McKittrick*, 305 U.S. 395 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Commissioner*, 305 U.S. 391 (1939); retaliation statutes were upheld barring imports from states that proscribed shipments of liquor from other states. See also *Jamison & Co.* v. *Morgenthau*, 307 U.S. 171 (1939) (per curiam); *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132 (1939). After balancing the competing federal com-

merce and state interests, the Court upheld the challenged state authority in each case.

This Court has also balanced the Twenty-First Amendment against the Export-Import Clause of the Constitution, the First Amendment, as well as the Fourteenth Amendment. In *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341 (1964), the Court held that states cannot tax imported liquor in violation of the Export-Import Clause; in *California* v. *LaRue*, 409 U.S. 109 (1972), a state statute prohibiting lewd or naked entertainment was held not to be in violation of the First Amendment; and in *Craig* v. *Boren*, 429 U.S. 190 (1976), this Court concluded that the liquor industry was not insulated from the FourteenthAmendment's requirements of equal protection, and due process, *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1970).

As recently as March 3, 1980, in *Midcal, supra*, the Court reinforced the existence of a "balancing test" by referring to *Hostetter* v. *Idlewild Liquor Corp.*, 377 U.S. 324 (1964), and stated:

> "Both the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution. *Like other provisions of the Constitution,* each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case". Id. at 332. (Emphasis added)

The taxing power is subject to no more or less reach than the commerce power, Export-Import Clause, First Amendment, or the Fourteenth Amendment. *New York* v. *United States*, 326 U.S. 572 (1946) P. 582:

> "Surely, the power of Congress to lay taxes has impliedly no less reach than the power of Congress to regulate commerce".

The lower Court erred by holding that the Twenty-First Amendment is pre-empted by the taxing powers. Were the lower Court to properly apply said test, it is clear that the scales would have tipped decidedly in favor of the state's longstanding interest and that the interests conveniently manufactured by the Court would provide little or no weight.

D. THE COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH OTHER FEDERAL DECISIONS.

Similar to the competing regulations in the within case, during the past year, the Fifth Circuit Court of Appeals for the Fifth Circuit had occasion to review competing federal and state regulations, as it relates to Section 2 of the Twenty-First Amendment.

In *Castlewood International Corp.* v. *Simon,* 596 F.2d. 638 (5th Cir., 1979), (Pet. Cert. granted 5/19/80); Judgment Vacated, cause remanded to 5th Circuit for further consideration in light of *Midcal, supra;* Opinion Restated 626 F.2d. 1200, 5th Cir. U.S. Court of Appeals (10/1/80), the Fifth Circuit balanced the competing interests of a Treasury regulation, restricting the discounts on alcoholic liquors, by a wholesaler to a retailer against a Florida Statute, which permitted unlimited non-discrimininatory discounts, and held in favor of the state statute. The Fifth Circuit observed that any analysis of the validity of a state statute, regulating liquor:

> "Must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme". 596 F.2d at 642.

Shortly thereafter, in *Wine Industry of Florida, Inc.* v. *Miller*, 609 F.2d, 1167 (1980), the Fifth Circuit upheld a Florida Statute which permitted certain services of Florida retailers by Florida distributors, whereas the federal regulation restricted the same services, related to the alcoholic beverage industry.

This Court, in *Heublein* v. *South Carolina Tax Commission*, 409 U.S. 275 (1972) reviewed a federal statute, 15 U.S.C. 381(a), which imposed limitations on the State's power to tax and a South Carolina Statute that required alcoholic beverage producers to undertake certain activities as a condition to doing business in the State, which activities subjected the producer to a State tax. South Carolina A.B.C. Act, S.Ct. Code Ann. Sec. 4-1 et seq. (1962) and Supp. 1971). After balancing the competing federal and state interests, the Court concluded that South Carolina's regulation was valid.

Castlewood, *Wine Industry* and *Heublein*, *supra*, are direct confrontations between federal and state statutes and regulations. In each case, competing interests were carefully scrutinized and reconciled based on a "balancing test".

Similarly, in the within case, there is a direct confrontation between a federal and state regulation, each adopted under authority of different constitutional provisions; one prohibits and the other permits the intrastate use of a 118 milliliter standard of fill. The court below refused to balance or carefully scrutinize the competing interests. Instead, the Court held that the Twenty-First Amendment is pre-empted by the taxing powers and invalidated Marlyland's regulation.

The holding of the lower Court is grievously contrary to the recent decisions of this Court set forth above and

if not reviewed will cause great confusion as to the precedent to be afforded said decisions.

E. THE HOLDING OF THE LOWER COURT HAS CREATED A CONFLICT AS IT RELATES TO THE JURISDICTION OF THE TAXING POWERS PERTAINING TO ALCOHOLIC BEVERAGES, WHEREBY IN THE PAST, SUCH AUTHORITY HAS BEEN COORDINATED AND NOT EXCLUSIVE.

Notwithstanding Petitioners' contention that the Treasury's exercise of the taxing powers in the within case is not reasonably related to protection of the revenue, the lower Court's holding has created a conflict which should have been avoided. By way of precedent, prior exercises of the taxing powers, by federal and state government, pertaining to alcoholic beverages, have been reconciled without conflict.

Federal and state "taxing powers" have been historically exercised concurrently. Direct federal regulation of the alcoholic beverage industry is governed by two separate schemes. First, the Federal Alcohol Administration Act, 27 U.S.C. §§ 201-211 ("F.A.A. Act"), was adopted under the "commerce powers" and, secondly, the Internal Revenue Code of 1954, 26 U.S.C. §§ Chapter 51 Subtitle E. "Alcohol, Tobacco and Certain Other Excise Taxes", was adopted pursuant to the "taxing powers". The "F.A.A. Act" pertains to matters in interstate commerce, such as issuance of permits, labeling and bottle sizes, and advertising, whereas, the Internal Revenue Code deals primarily with the imposition of two types of liquor taxes; federal liquor gallonage taxes, and occupational taxes. Whether the federal authority was exercised under the F.A.A. Act or Internal Revenue Code, it has

existed concurrently, rather than exclusively, with state regulation.

Both federal [1] and state [2] liquor taxes are imposed on volume of liquid, measured by gallonage and not standards of fill. Also, the federal [3] and state [4] taxing authorities impose occupational taxes concurrently. Under gallonage taxes and occupational taxes, we have a direct exercise of the "taxing power" by the federal and state government, pertaining to the same product and subjects, concurrently, rather than exclusively.

From the whole structure of the F.A.A. Act together with the federal power to tax the alcoholic beverage industry it is contemplated by the Twenty-First Amendment that each sovereign should operate within its own sphere but to the extent possible exert their authority in conformity rather than in conflict with that of the other. The conflict only arises in this instance where the Treasury, be it acting under its constitutional commerce or taxing power, attempts to prohibit purely local conduct, by regulating what a state acting under the Twenty-First Amendment has long permitted and specifically mandates by regulation.

Similarly, Regulation 201.540(b) need not be invalidated but limited to transactions involving interstate

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[1] U.S.C. 5001 and 5002, Internal Revenue Code of 1954.

[2] Article 2B, Section 133, *Annotated Code of Maryland*, 1957. For all other states, see Liquor Control CCH Topical Digest paragraph (800).

[3] 26 U.S.C. Section 5081, Internal Revenue Code of 1954.

[4] State sales taxes in effect throughout the various states are occupational taxes. See CCH State Sales Tax Series.

commerce thus recognizing that Maryland's regulation does not violate the commerce clause or the limitations as to standards of fill adopted under authority of the F.A.A. Act.

It is of interest to note that the Treasury, after an adverse ruling in *Castlewood, supra,* adopted Plaintiff's argument of "avoiding a conflict", when federal and state regulations pertain to the same subject matter. In its Petition for Certiorari to the Supreme Court of the United States (October term 1979-79-1156) based upon the Fifth Circuit's decision in *Castlewood,* the Treasury argued at page 20 of its Petition, that:

> "The Federal Alcohol Administration Act was passed in 1933, less than two years after ratification of the Twenty-First Amendment. Thus, for almost thirty-five years, there has been a regime of concurrent regulation of the trade and alcoholic beverages. The Court of Appeals' erroneous finding of a 'conflict' here, if allowed to stand, could upset this delicate interplay of federal and state regulation. Congress learned from experience, during Prohibition, that, as a practical matter, it cannot impose uniform national standards relating to local sale and consumption of a product that arouses the strong emotions that attend the use of alcoholic beverages; these matters are appropriately left to state regulation".

On the basis of the foregoing authorities, the per curiam decisions of the United States Court of Appeals for the Fourth Circuit constitutes an unconstitutional intrusion into the constitutionally mandated regulatory authority of the State of Maryland.

CONCLUSION

For all of the foregoing reasons, petitioners urge that this Court grant the instant petition.

Respectfully submitted,

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APPENDIX A

OPINION

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Appeals from the United States District Court for the District of Maryland, at Baltimore. Frank A. Kaufman, District Judge.

Argued January 6, 1981 Decided February 3, 1981

Before WINTER, BUTZNER, and WIDENER, Circuit Judges.

Morton Siegel (Michael A. Moses, Morton Siegel, Ltd. for Appellants Heublein, Inc.; Gerald Langbaum, Assistant Attorney General for Appellant Louis L. Goldstein and State of Maryland; Stephen G. Gilden, Wartzman, Rombro, Rudd and Omansky, P.C. for Appellant Overbrook Egg Nog; Harold V. Gorman, Jr. for Appellant Heublein, Inc. on brief); Mary A. McReynolds, Civil Division, Department of Justice (Alice Daniel, Assistant Attorney General; Russell T. Baker, Jr. U.S. Attorney; Anthony J. Steinmeyer, Civil Division, Department of Justice on brief) for Appellees.

PER CURIAM:

Plaintiffs appeal from a summary judgment for defendants in their suit attacking the validity of a federal regulation prohibiting the use of a four-ounce standard of fill for liquor bottles in Maryland and elsewhere. They

contend that, if properly construed, the regulation, 27 C.F.R. § 201.540b, does not prohibit the use of that standard of fill in intra-state commerce, that the regulation was beyond the delegated powers of the Secretary of the Treasury under the applicable statute, that Congress could not constitutionally delegate authority to the Secretary to adopt the regulation, and that the Twenty-first Amendment preserved to Maryland the authority to prescribe the bottle size that the regulation seeks to prohibit.

In a thorough opinion the district court considered these contentions and decided each against plaintiffs. From our study of the record and consideration of the arguments, both oral and written, we think that the district court decided correctly, and we affirm on its opinion, Goldstein v. Miller, ... F. Supp. ..... (D. Md., 1980).

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1327

THE OVERBROOK EGG NOG CORPORATION, etc., et al.,
Appellants,

versus

G. WILLIAM MILLER, etc., et al.,
Appellees.

ORDER

(Filed Mar 4 1981)

Upon consideration of the appellant's petition for rehearing by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Winter, with the concurrence of Judge Butzner and Judge Widener.

For the Court,

/s/ William K. Slate, II
CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

LOUIS L. GOLDSTEIN, Comptroller of the Treasury of the State of Maryland; and STATE OF MARYLAND,

v.

G. WILLIAM MILLER, Secretary of the Treasury; and G. R. DICKERSON, Director of the Bureau of Alcohol, Tobacco and Firearms,

CIVIL NO. K-79-2163

THE OVERBROOK EGG NOG CORPORATION, A Maryland corporation; and HEUBLEIN, INC., A Connecticut corporation,

v.

G. WILLIAM MILLER, Secretary of the Treasury; and G. R. DICKERSON, Director of the Bureau of Alcohol, Tobacco and Firearms,

CIVIL NO. K-79-2164

Filed: April 25, 1980

Stephen H. Sachs, Attorney General of Maryland, and Gerald Langbaum, Assistant Attorney General, of Baltimore, Maryland, for Plaintiffs in Civil No. K-79-2163.

Steve G. Gilden and Wartzman, Rombro, Rudd & Ormansky, P.A., of Baltimore, Maryland, for Plaintiff The Overbrook Egg Nog Corporation, and Morton Siegel, of Chicago, Illinois, and Harold V. Gorman, Jr., of Hartford, Connecticut, for Plaintiff Heublein, Inc., in Civil No. K-79-2164

Alice Daniel, Acting Assistant Attorney General, of Washington, D. C., Russell T. Baker, Jr., United States Attorney, of Baltimore, Maryland, Ellen Hollander, Assistant United States Attorney, of Baltimore, Mary-

land, William P. Arnold and Sandra M. Schraibman, Attorneys, Department of Justice, Washington, D. C., for Defendants.

KAUFMAN, DISTRICT JUDGE.

On February 29, 1980, this Court filed an opinion in these cases denying plaintiffs' quests for injunctive and other relief and entering judgment for defendants. Subsequently, all plaintiffs have noted appeals to the United States Court of Appeals for the Fourth Circuit. These cases are now before this Court on plaintiffs' motion seeking injunctions pending appeal pursuant to Federal Civil Rule 62(c).[1] The standards which govern in connection with such motions are set forth by Judge Winter in Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970).

> Briefly stated, a party seeking a stay must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay.

The combination of Federal Civil Rule 62(c) and Rule of Appellate Procedure 8(a) imposes, in the first instance,

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[1] Federal Civil Rule 62(c) provides, in pertinent part:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. • • •

Rule 8(a) of the Rules of Appellate Procedure provides, in pertinent part, as follows:

> Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. • • •

upon the district court the duty of deciding whether to grant or deny a stay pending appeal. In Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Manufacturing Co., Inc., 550 F.2d 189, 193-94 (4th Cir. 1977), the Fourth Circuit reversed the trial court's refusal to grant a preliminary injunction under Federal Civil Rule 65(a). In so doing, Judge Craven wrote:

> The cases relied upon by the district court deal with the question of the issuance *vel non* of an *appellate* stay pending review of an administrative order or a trial court decision that dealt with the merits of a controversy. Hence they propound an *appellate* standard—and not one for use in the trial courts.
>
> • • •
>
> Likewise, *Long* v. *Robinson,* 432 F.2d 977 (4 Cir. 1970), another "strong showing" case from this circuit, involved a stay-pending-appeal situation, in which the district court had *fully considered the merits of the controversy,* rendered its final decree, and refused the request for an interim stay. Judge Winter explained in *Long* that the petitioner's burden in seeking injunctive relief is substantially greater on appeal.
>
> • • •
>
> Therefore, the district court erred in guiding itself by an appellate standard inappropriate at the trial level. [Footnote omitted; emphases in original.]

Herein, the four segments set forth by Judge Winter in *Long* require both separate and combined analyses.

1. *Likelihood of Success*

The likelihood-of-success standard does not mean that the trial court needs to change its mind or develop serious doubts concerning the corrections of its decision in order to grant a stay pending appeal. Thus, in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843-45 (D.C. Cir. 1977), Judge Leventhal wrote:

Implicit in the Commission's argument against the stay is the view * * * that a lesser showing, of, say, a chance of prevailing that is only fifty percent or less is insufficient even though the "balance of equities," as determined by a consideration of the other three factors, clearly favors a stay.

* * * [W]e decline to entertain this assumption. Instead, we hold that * * * a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other factors.

* * *

* * * Prior recourse to the initial decision-maker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision. What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.

In Evans v. Buchanan, 435 F. Supp. 832, 843-44 (D. Del. 1977), Judge Schwartz wrote:

* * * *Strong Showing on the Merits*

According to the test accepted by virtually all courts, including this one, one seeking a stay pending appeal on disposition of writ of certiorari must make "a strong showing that he is likely to succeed on the merits of the appeal." *Reserve Mining Co.* v. *United States, supra,* 498 F.2d at 1076. Although this standard is similar to one of the tests for issuance

of a preliminary injunction, the posture of a case is significantly different when preliminary injunctive relief is sought from when a stay is requested. In the former, the Court has not ruled on the merits of the case and need only make an initial determination of the reasonable probability of the applicant's eventual success. [Citation omitted]. In the latter, the Court has issued its determination, after a full consideration of the merits. The above-quoted standard would seem to require that a district court confess to having erred in its ruling before issuing a stay.

* * *

* * * It seems illogical * * * to require that the court in effect conclude that its original decision in the matter was wrong before a stay can be issued. Rather, a stay may be appropriate in a case where the threat of irreparable injury to the applicant is immediate and substantial, the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear and the interests of the other parties and the public are not harmed substantially. This is not to say, however, that every time a case presents difficult questions of law a stay should be entered. As noted earlier, the four factors must be viewed together and the interest of the movant balanced against the interests of the other parties and the public. It is the duty of the court to exercise its discretion so that an equitable resolution is achieved. * * * [Footnotes omitted].

The contentions advanced by plaintiffs prior to the filing by this Court of its opinion on February 29, 1980 are discussed in that opinion. Some of those same contentions are repeated in motions and memoranda filed in support of the presently pending quests of plaintiffs for stays pending appeal. Additionally, plaintiffs have embellished some of their oriignal contentions and have argued that the effect of California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., ... U.S. ....., decided

by the Supreme Court of the United States on March 3, 1980, is in their favor. In that case, Mr. Justice Powell, writing for a unanimous Court,[2] held that California's resale price maintenance and price posting statutes for the wholesale wine trade were invalid because in conflict with the Sherman Act, and that the California standard was not protected from invalidation by section 2 of the Twenty-first Amendment. Mr. Justice Powell, slip op. at 8, characterized that section of the Twenty-first Amendment as "reserv[ing] to the States certain power to regulate traffic in liquor," and noted that the issue in *Midcal* was whether section 2 of the Twenty-first Amendment "permits California to countermand the congressional policy—adopted under the commerce power—in favor of competition" (slip op. at 9). The Justice further noted that the "control [given to the states by the Twenty-first Amendment] logically entails considerable regulatory power not strictly limited to importing and transporting alcohol." Slip op. at 9. After examining a number of prior Supreme Court decisions, Mr. Justice Powell concluded that "[s]ubsequent decisions have given 'wide latitude' to state liquor regulation, *Seagram & Sons* v. *Hostetter*, 384 U.S. 35, 42 (1966), but they have also stressed that important federal interests in liquor matters survived the ratification of the Twenty-First Amendment." Slip. op. at 10. The Justice then briefly cited and discussed Department of Revenue v. James Beam Co., 377 U.S. 341 (1964); Craig v. Boren, 429 U.S. 190, 204-09 (1976), and Wisconsin v. Constantineau, 400 U.S. 433, 436 (1970), all of which are discussed in some detail in this Court's opinion filed February 29, 1980. The Justice, after stating that (slip op. at 10): "[m]ore difficult to define, however, is the extent to which Congress can regulate liquor under its interstate commerce power," concluded (slip op. at 12):

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[2] Mr. Justice Brennan did not participate in the decision.

> These decisions demonstrate that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." Hostetter v. Idlewild Liquor Corp., 377 U.S., at 332.

Mr. Justice Powell ended his opinion as follows (slip op. at 16):

> We need not consider whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy. The unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act.

In this case, the federal interest in a viable system of taxation is a strong one, seemingly at least as strong as the federal interest in promoting competition to which the Supreme Court gave precedence in *Midcal*. Thus, even if the second section of the Twenty-first Amendment is applicable when the federal power involved is the taxing power and not the commerce power, which this Court very much doubts, *Midcal* teaches that the Twenty-first Amendment is to be applied on a careful balancing basis when state action conflicts with the exercise by the federal government of a power or powers granted to it by the federal Constitution. In any event, to date, the Twenty-first Amendment has not been utilized to invalidate or restrict federal exercise of the taxing power.

Plaintiffs assert that this Court did not "reach the question of whether the taxing power can be exercised

with respect to what are *entirely* intrastate transactions." Slip op. at 23; emphasis in original. Plaintiffs do not contend that the federal government may not tax the sale of 118 milliliter (quarter pint) bottles within Maryland. Herein the purpose of the challenged regulation is purportedly to permit the more efficient administration of that federal taxing power. While the regulation does not itself impose a tax, it was promulgated to aid the efficient collection of liquor taxes. The above-quoted comment of this Court was made after lengthy quotations from Arrow Distilleries v. Alexander, 109 F.2d 397 (7th Cir.), *cert. denied*, 310 U.S. 646 (1940), in which there was discussion of interstate vs. intrastate activities. Also, after that comment, this Court concluded (slip op. at 23-24; footnote omitted):

> Even assuming, *arguendo* only, that if that federal prohibition were grounded on the exercise of the commerce power, it would violate the state's authority under the Twenty-first Amendment, there is no authority for holding that that Amendment restricts the otherwise valid exercise of the taxing power by the federal government to prevent something a state desires to permit.

So that any conclusion will be totally eliminated, this Court, at this time, does explicitly "reach the question of whether the taxing power can be exercised with respect to what are *entirely* intrastate transactions," (emphasis in original), and answers that question in the affirmative. In so doing, this Court notes the distinction between the exercise of the taxing power and the commerce power. Further, this Court would so conclude even if the challenged action of the state were restrictive rather than permissive.

However, despite this Court's strong belief as to the correctness of its views as set forth in its February 29, 1980 opinion, there is little doubt that at least some of the issues raised in these cases present serious questions of first impression. For that reason, this Court

concludes that plaintiffs have met the burden imposed by the first of the four standards applicable herein.

2. *Irreparable Injury to Plaintiffs*

Mere economic injury is rarely, if ever, sufficient to warrant entry of a stay of judgment to protect a party against it, particularly if a remedy exists whereby any economic injury may be repaired. *See* Long v. Robinson, *supra* at 980-81: Virginia Petroleum Jobbers Assn. v. Federal Power Commission, 259 F.d 921, 925 (D.C. Cir. 1958). However, "when the potential economic loss is so great as to threaten the existence of the moving party's business, then an injunction may be granted, even though the amount of direct financial harm readily is ascertainable." Wright and Miller, Federal Practice & Procedure § 2948 at 440. *See* Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d at 843 & n.2.

Plaintiff Overbrook has alleged that it will be forced to go out of business if a stay is not granted. Such injury would be serious and seemingly irreparable, *i.e.*, without adequate remedy against the federal government, should plaintiffs ultimately prevail in these cases. Potential injury to the other plaintiffs would not seem to be so grave even though plaintiff Heublein may lose business and even though the State of Maryland may lose some tax revenue.[3]

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[3] The federal government contends that some, if not all, of the problems plaintiffs encounter at this time have been caused by plaintiffs' own failure to take advantage of ATF invitations to comment, etc. on the challenged regulation prior to its promulgation and/or to commence this litigation at earlier dates. In Long v. Robinson, *supra* at 981, delays by the moving party were a factor in Judge Winter's decision to deny a stay pending appeal. However, while plaintiffs' written and oral presentations to this Court contain assertions of facts relating to such alleged delays, defendants explain the same on other bases. The record does not enable this Court to resolve the different emphases and positions of the parties

3. *Irreparable Injury to Defendants*

The defendants in these cases agreed to postpone enforcing the challenged regulation with regard to Maryland's permitting the use of 118 milliliter (quarter-pint) bottles from January 1, 1980, the date the regulation was to go into effect, until 14 days after this Court's entry of judgment on February 29, 1980. Such postponment seemingly did not cause any irreparable injury to defendants.[4] Moreover, simply postponing enforcement of the federal regulation challenged herein seemingly will not prevent its successful enforcement elsewhere and will not materially affect, in the long run, the institution of a nationwide taxing regulatory system if this Court's judgment is upheld on appeal. At a hearing held on the motion for stays on the record in open Court on April 16, 1980, counsel for the government candidly indicated that the postponement of the enforcement of the federal regulation challenged herein would not materially injure the defendants.

4. *The Public Interest*

The public interest lies marginally against the grant of a stay pending appeal since the interests of the greatest number of persons may be better served by allowing the federal government to implement its system of taxing liquor. However, the stay sought herein would only involve what can be expected to be a short delay in such

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[3] (Continued)
in those regards. In any event, even assuming, *arguendo*, that plaintiffs have been guilty ofsome unjustifiable delays in these cases, the existence of such delays, although a factor which must be weighed against plaintiffs, does not, when considered together with all of the other facts in these cases, alter the overall balance in favor of plaintiffs.

[4] By way of contrast, in Long v. Robinson, *supra* at 981, the prevailing plaintiffs in the trial court would have been irreparably damaged if the stay pending appeal had been granted.

implementation and such delay can hardly be of great general import. On the other hand, while the temporary unavailability of quarter-pint bottles, even if a number of persons prefer their use, would in itself hardly seriously harm the public interest, the general community as well as Overbrook would suffer a loss if Overbrook were to close down. On balance, the public interest factors do not appear to pull strongly in one direction or the other.

Conclusion

The burden on those seeking an injunction pending appeal is a heavy one—much heavier than when an interlocutory injunction is sought in the trial court before the trial court has entered judgment. Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Manufacturing Co., 550 F.2d at 194. The issues adjudicated in these cases are to some extent issues of first impression. If a stay is not granted, Overbrook may well go out of business. No irreparable injury to defendants will result if a stay pending appeal is granted. The public interest will not be seriously affected by the grant or the denial of a stay. On balance, all the plaintiffs have met their burden under the first standard and Overbrook has met its burden under the second standard. The State and Heublein get the benefit thereof. The record does not establish any reason under the third and fourth standards for the requested stays pending appeal to be denied. In Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Manufacturing Co., Inc., *supra at* 196, Judge Craven wrote the following concerning preliminary injunctions:

> Thus in this circuit the trial court standard for interlocutory injunctive relief is the balance-of-hardship test. Whenever a district court has before it a Rule 65(a) motion, although it may properly consider the four general factors enumerated in *Airport* [Commission of Forsyth Co., N.C. v. CAB, 296 F.2d 95 (4th Cir. 1961)], it should give them the

relative emphasis required by the *Sinclair* [Refining Co. v. Midland Oil Co., 55 F.2d (4th Cir. 1932)] rule: The two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with a decree. If that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented; and plaintiff need not show a likelihood of success. Always, of course, the public interest should be considered.

Here the district court erroneously required *a strong showing of success* as a prerequisite to relief. [Emphasis in original.]

The Fourth Circuit has seemingly not specifically used "balancing" language in applying the four standards to determinations of quests for stays pending appeal. But there is no reason to believe that such "balancing" is not appropriate in that latter context as well as in the interlocutory context. For the reasons stated *supra*, the application of the "balancing" approach favors plaintiffs. Accordingly, a stay order will today issue for the benefit of all plaintiffs herein.[5]

/s/ Frank A. Kaufman
United States District Judge

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[5] At the above-mentioned April 16, 1980 hearing, counsel for plaintiffs agreed to comply with as reasonably fast briefing and oral argument schedules as the government desires and as the Fourth Circuit establishes. The parties have already fully briefed the legal issues in the course of their presentations to this Court. Thus, all counsel should be able to submit briefs and prepare for oral argument on a rapid basis.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

LOUIS L. GOLDSTEIN, Comptroller of the Treasury of the State of Maryland; and STATE OF MARYLAND,

v.

G. WILLIAM MILLER, Secretary of the Treasury; and G. R. DICKERSON, Director of the Bureau of Alcohol, Tobacco and Firearms,

CIVIL NO. K-79-2163

THE OVERBROOK EGG NOG CORPORATION, A Maryland corporation; and HEUBLEIN, INC., A Connecticut corporation,

v.

G. WILLIAM MILLER, Secretary of the Treasury; and G. R. DICKERSON, Director of the Bureau of Alcohol, Tobacco and Firearms,

CIVIL NO. K-79-2164

ORDER

For the reasons set forth in an opinion filed even date herewith, this Court hereby stays its February 29, 1980 judgment pending appeal in these cases. It is so ORDERED, this 25th day of April, 1980.

The Clerk is directed to mail copies of this Order and of the aforementioned opinion to counsel of record.

/s/ Frank A. Kaufman
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

LOUIS L. GOLDSTEIN, Comptroller of the Treasury of the State of Maryland; and STATE OF MARYLAND,

v.

G. WILLIAM MILLER, Secretary of the Treasury; and G. R. DICKERSON, Director of the Bureau of Alcohol, Tobacco and Firearms,

CIVIL NO. K-79-2163

THE OVERBROOK EGG NOG CORPORATION, A Maryland corporation; and HEUBLEIN, INC., A Connecticut corporation,

v.

G. WILLIAM MILLER, Secretary of the Treasury; and G. R. DICKERSON, Director of the Bureau of Alcohol, Tobacco and Firearms,

CIVIL NO. K-79-2164

Filed: February 29, 1980

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Alice Daniel, Acting Assistant Attorney General, of Washington, D. C., Russell T. Baker, Jr., United States Attorney, of Baltimore, Maryland, Ellen Hollander, Assistant United States Attorney, of Baltimore, Maryland, William P. Arnold and Sandra M. Schraibman, Attorneys, Department of Justice, Washington, D. C., for Defendants.

KAUFMAN, DISTRICT JUDGE.

These two cases present the question of whether the federal government acting pursuant to its taxing power may restrict, by federal regulation, the number of bottle sizes which may be used in bottling spirits in Maryland for sale within Maryland's borders. Plaintiffs in Civil No. K-79-2163 are the Comptroller of the Treasury of the State of Maryland and the State itself. Plaintiffs in Civil No. K-79-2164 are The Overbrook Egg Nog Corporation and Heublein, Inc. Defendants in both cases are the Secretary of the Treasury and the Director of the Bureau of Alcohol, Tobacco and Firearms. Jurisdiction in both cases exists under 28 U.S.C. § 1331. All plaintiffs seek injunctive and declaratory relief to prevent the said federal regulation from becoming effective. Initially, the regulation was to go into effect on January 1, 1980. However, by agreement of the parties hereto, the regulation has been held in abeyance pending the filing of the within opinion.

FACTS

The relevant and material facts are undisputed and disclose the following:

1. Louis L. Goldstein is the Comptroller of the Treasury of the State of Maryland and has the responsibility under the laws of Maryland for the regulation of the manufacture, sale, distribution, transportation and storage of alcoholic beverages within Maryland.

2. The Overbrook Egg Nog Corporation is a Maryland corporation licensed by the State to engage in business as a bottler of distilled spirits within Maryland. Overbrook also holds a permit from the Department of the Treasury to operate as a rectifier and distiller and pays federal tax to and registers with the Treasury as a rectifier.

3. Heublein, Inc. is a Connecticut corporation which manufactures and produces distilled spirits outside of Maryland, and has a permit from the State of Maryland allowing it to sell, consign, and deliver alcoholic bever-

ages from outside of Maryland to persons in Maryland, including Overbrook, who are authorized to receive such spirits in Maryland. Heublein holds a Treasury permit to act as a distiller, pays federal taxes as a distiller and registers with the Treasury as such.

4. G. William Miller is the Secretary of the Treasury of the United States.

5. G. R. Dickerson is the Director of the Bureau of Alcohol, Tobacco and Firearms (ATF), a bureau within the Treasury Department.

6. On March 10, 1976, the ATF adopted final regulations establishing metric standards of fill (liquor-bottle sizes) under 27 C.F.R. Part 5, relating to the sale, shipment, or introduction of bottled distilled spirits in interstate or foreign commerce, which list of bottle sizes did not include a 118 milliliter (the approximate metric equivalent to the quarter-pint) standard of fill. The regulations were promulgated under the Federal Alcohol Administration Act, 27 U.S.C. §§ 201 *et seq.* The list of permitted botle sizes appears a 27 C.F.R. § 5.47a.

7. On Oct. 26, 1976, ATF adopted final regulations implementing metric standards of fill for distilled-spirits bottles under the authority of the Internal Revenue Code of 1954, 26 U.S.C. § 5301. Thos regulations included an amendment to 27 C.F.R. § 201.540b which adopted the metric standards of fill of 27 C.F.R. § 5.47a, but provided an exception to permit the use of four-ounce (quarter-pint) liquor bottles through December 31, 1979 for the packaging of distilled spirits in intrastate commerce only.

8. On November 16, 1979, the State of Maryland, acting through Comptroller Goldstein, adopted a final regulation, code of Maryland Regulations (COMAR) 03.02.01.06, establishing within Maryland, as of January 1, 1980, the metric standards of fill previously adopted by ATF, and additionally allowing the use of the 118 milliliter bottle in intrastate commerce within Maryland.

9. Since 1950 Overbrook has bottled in Maryland distilled spirits in quarter-pint (118 milliliter) bottles for Heublein and four other out-of-state manufacturers and producers of distilled spirits.

10. Overbrook's bottling process has taken and presently continues to take place at Overbrook's plant in Baltimore, Maryland. The liquor is shipped in bulk by Heublein from Connecticut to Maryland. The bottles, caps, and labels are shipped to Overbrook from locations within and without Maryland. The labels on the filled bottles state that the bottles are for sale wihin Maryland only. The filled bottles are stored at the Overbrook plant in Maryland until picked up by Maryland distributors for distribution to Maryland retailers.

STATUTES AND REGULATIONS

The regulation at the core of the dispute in the within cases is 27 C.F.R. § 201.540b, which provides in relevant part:

> Liquor bottles shall conform to the applicable standards of fill provided in Subpart E of 27 CFR Part 5, including those for liquor bottles of less than 200 ml. capacity. The use of any bottle size other than as authorized in Subpart E of 27 CFR Part 5 is prohibited for the packaging of distilled spirits for domestic purposes, except that 4-ounce liquor bottles may be used through December 31, 1979, for packaging any distilled spirits, other than spirits bottled in bond after determination of tax, on bottling premises for sale in intrastate commerce only.

In 27 C.F.R. § 201.540b, defendants incorporated by reference the list of bottle sizes from 27 C.F.R. Part 5 Subpart E, but did not adopt any other part of that regulation. 27 C.F.R. § 207.540b was promulgated pursuant to 26 U.S.C. § 5301(a), a provision of the Internal Revenue Code, which states in relevant part:

> (a) Requirements.—Whenever in his judgment such action is necessary to protect the revenue, the

> Secretary or his delegate is authorized, by the regulations prescribed by him and permits issued thereunder if required by him—
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> (1) to regulate the kind, size, branding, marking, sale, resale, possession, use, and reuse of containers of a capacity of not more than 5 wine gallons) designed or intended for use for the sale of distilled spirits * * *.

26 U.S.C. § 5301 was enacted "to protect the revenue" and thus pursuant to the taxing power of Congress, embodied in the United States Constitution, Article I, Section 8, Clause 1, which contains the following authorization:

> The Congress shall have Power To lay and collect taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States * * *.

The substantive provisions of both 26 U.S.C. § 5301 and 27 C.F.R. § 201.540b have been in existence for approximately forty-six years with wording and impact substantially similar to the wording and impact which they have today. 26 U.S.C. § 5301 was first approved by the Congress on June 18, 1934, in the form of House Joint Resolution 370 (48 Stat. 1020), which states:

> Joint Resolution To protect the revenue by regulation of the traffic in containers of distilled spirits
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> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever in his judgment such action is necessary to protect the revenue, the Secretary of the Treasury is authorized by the regulations prescribed by him, and permits issued thereunder if required by him (1) to regulate the size, branding, marking, sale, resale, possession, use, and re-use of containers * * * designed or intended for use for the sale at retail of distilled spirits * * *.

H.J. Res. 370 became 26 U.S.C. § 2871 in the Internal Revenue Code of 1939. The above-quoted language in H.J. Res. 370 remained the same. In 1954, when Congress revised the Internal Revenue Code, section 2871 was reenacted as 26 U.S.C. § 5214 with its language left virtually intact.[1] In 1958, the above-quoted portion of H.J. Res. 370 became that part of 26 U.S.C. § 5301(a) quoted *supra* at p. 5.

Immediately after the passage of H.J. Res. 370 in 1934, and pursuant to the authority therein conferred upon him, the Secretary of the Treasury promulgated Regulations 13. Article 3 of Regulations 13 states that "the use for packaging distilled spirits for sale at retail of containers of one-half pint capacity or greater, other than liquor bottles as herein defined and otherwise conforming to these regulations, is prohibited * * *." Appendix B of Regulation 13, as originally promulgated in 1934, and as revised in April of 1935, sets forth the following standards of fill, namely, 1 gallon, ½ gallon, 1 quart, 4/5 quart, 1 pint, and ½ pint, and provided that certain types of liquor might also be bottled in 4/5 pint bottles.[2] The standards of fill set forth in Appendix B were exclusive for all liquor bottles of greater than ½ pint capacity. As article 3 of Regulations 13 indicated, however, the federal government did not at that time seek to regulate bottle sizes for bottles of under ½ pint capacity.

In 1940, pursuant to the authority granted by 26 U.S.C. § 2871,[3] the Secretary promulgated Regulations 6 § 188.70, in which he extended the regulation of bottled-

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[1] H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), *reprinted in* 1954 U.S. Code Cong. & Admin. News 4019, 4499; S. Rep. [Unnumbered], 83d Cong., 2d Sess. (1954), *reprinted in* 1954 U.S. Code Cong. & Admin. News 4621, 5160.

[2] As originally promulgated in 1934, Regulations 13 also included certain temporary permissible standards of fill.

[3] Present 26 U.S.C. §5301(a) was then so codified.

in-bond liquor to bottle sizes of ½ pint and under. At that time, the only permissible sizes for bottled-in-bond liquor equal to or under ½ pint became ½ pint, ⅛ pint, 1/10 pint, and, for brandy, 1/18 pint.[4]

The 1934 and 1940 regulations remained essentially the same—although occasionally recodified—until 1968. In 1968, the bottle sizes for bottled-in-bond liquor and for all other bottling were combined by the Secretary into one regulation, 26 C.F.R. § 201.540b, which provided in relevant part:

> Liquor bottles shall conform to the applicable standards of fill provided in Subpart H of 27 CFR Part 5, including those for liquor bottles of less than 1/2-pint capacity. The use of any bottle size other than as authorized in subpart H of 27 CFR Part 5 is prohibited for the packaging of distilled spirits for domestic purposes, except that 4-ounce liquor bottles may be used for packaging any distilled spirits on bottling premises for sale in intrastate commerce only.

See 33 Fed. Reg. 6816 (May 4, 1968).

The regulation remained essentially the same until 1976. On August 30, 1976, AFT published a notice of proposed rulemaking to amend 26 C.F.R. § 201.540b to permit metric-size bottles only[5]. The notice of August 30, 1976 also proposed further to amend 26 C.F.R. § 201.540b by prohibiting the use of ¼ pint liquor bottles after December 31, 1979.[6] That notice invited the sub-

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[4] Prior to 1968, the federal government did not restrict bottle sizes under one-half pint for liquor not bottled-in-bond, although *all* bottle sizes for bottled-in-bond liquor were seemingly regulated. After 1968, *all* bottle sizes for liquor (whether or not bottled-in-bond) were regulated.

[5] 41 Fed. Reg. 36503 (1976).

[6] 26 C.F.R. § 201.540b was also renumbered *27* C.F.R. § 201.540b.

mission of written comments or other materials by September 29, 1976, and stated that ATF believed that the change to metric bottle sizes would result in "reduction in the number of bottle sizes," and that such reduction was supported by the industry because of cost considerations and would facilitate ATF recordkeeping requirements.[7] Two comments were received, neither from any of plaintiffs in the within two cases, and neither opposed abolition of the quarter pint bottle.[8] The proposed amendments became effective on October 26, 1976.[9]

On March 10, 1976, AFT issued final rules, amending 27 C.F.R. Part 5 to permit metric-size bottles only. Unlike the standards of fill established in 27 C.F.R. § 201.540b, which were promulgated pursuant to a provision in the Internal Revenue Code, the metric bottle sizes set forth in 27 C.F.R. Part 5 Subpart E were established pursuant to 27 U.S.C. § 205, part of the

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[7] *See* 41 Fed. Reg. 36499-500.

[8] 41 Fed. Reg. 46850 (1976).

[9] In 1979, the Congress enacted the Distilled Spirits Tax Revision Act of 1979, Title VII of P.L. 96-39, 96th Cong., 1st Sess. That new law—a tax law—changed the Internal Revenue Code liquor provisions in certain respects. In order to implement that new law, the regulations contained in 27 C.F.R. § 201 were revised and renumbered. Their effective date was January 1, 1980. 44 Fed. Reg. 71629 (December 11, 1979). 27 C.F.R. § 201.540b is now to be found at 27 C.F.R. § 19.632. That latter provision is identical to 27 C.F.R. § 201.540b, except that the exemption (until January 1, 1980, the effective date of the renumbered regulations) of quarter-pint bottles has been omitted from §19.632.

In renumbering section 201.540b as section 19.632, the Secretary reiterated that that regulation was promulgated pursuant to 27 U.S.C. §5301. 44 Fed. Reg. 71676 (December 11, 1979). That regulation, *i.e.*, 27 C.F.R. § 201.540b, was so numbered at the time the within cases were filed and is so referred to hereinafter.

Federal Alcohol Administration Act (FAA Act).[10] Pursuant to its final rules, AFT amended 27 C.F.R. § 5.47(a) to read as follows:

> *Authorized standards of fill.* On or after January 1, 1980, the standards of fill for all distilled spirits, whether domestically bottled or imported, shall be as follows:
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> | | |
> |---|---|
> | 1.75 liters | 500 milliliters |
> | 1.00 liter | 200 milliliters |
> | 750 milliliters | 50 milliliters |

Under AFT's final rules, beginning on October 26, 1976, the use of metric (as opposed to English) sizes became optional until December 31, 1979 and became mandatory

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[10] The preamble of 27 U.S.C. § 205 reads as folows:

§ 205. Unfair competition and unlawful practices.

It shall be unlawful for any person engaged in business as a distiller, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, or distilled spirits, directly or indirectly or through an affiliate: * * *.

The preamble to section 205 does not recite the particular power of the Congress under which 27 U.S.C. § 205 was enacted. However, each of the subsections of section 205 refers throughout to "interstate or foreign commerce" and the applicability of the subsections of section 205 to "interstate or foreign commerce." That is to be contrasted with 27 U.S.C. § 203, which prevents persons from engaging in interstate or foreign commerce in liquor without first obtaining a Treasury permit. That section of the FAA Act was passed—

> In order effectively to regulate interstate and foreign commerce in distilled spirits, wine, and malt beverages, to enforce the twenty-first amendment, and to protect the revenue and enforce the postal laws with respect to distilled spirits, wine, and malt beverages: * * *.

27 U.S.C. § 205 was seemingly aimed only at the regulation of interstate or foreign commerce as such. *See* n.13, *infra.*

on January 1, 1980. 41 Fed. Reg. 36499 (August 30, 1976).

Unlike 27 C.F.R. § 201.540b, which applies to "domestic" commerce, 27 C.F.R. Part 5 Subpart E. is applicable only to "interstate or foreign commerce." [11] The regulations in 27 C.F.R. § 5.49(a) set forth the number of bottles of each size which are to be packed in a shiping case. Thus, the regulation requires that the number of bottles in any given case be determined by the size of those bottles.

The amendments to 27 C.F.R. Part 5 subpart E converted the standards of fill from English to metric capacities, and authorized the above-mentioned six sizes. The metric equivalent of the quarter-pint bottle (118 milliliters) was not included. Prior to the adoption of the metric system, 27 C.F.R. §5.47(a) authorized for foreign and interstate use 10 standards of fill: 1 gallon, one-half gallon, 1 quart, four-fifths quart, 1 pint, four-fifths pint, one-half pint, one-eighth pint, one-tenth pint, and one-sixteenth pint (brandy only). A bottle size of one-quarter pint was not included in that list. Until the amendment in 1976 of 27 C.F.R. § 201.540b, however, quarter-pint (118 milliliter) bottles were not prohibited for *intrastate* use. *See* pp. 4, 7-8, *supra.*

27 C.F.R. Part 5 applies to interstate and seemingly not to intrastate commerce. The power of the Congress over foreign and interstate commerce is embodied in the following words of the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3: "(The Congress shall have Power) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * *." The scope of congressional power to regulate liquor is, however, affected by the Twenty-first Amendment to the United States Constitution, Section 2, which reads as follows: "The transportation or importation into any State, Territory, or pos-

[11] 27 C.F.R. §5.45.

session of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Pursuant to Md. Ann. Code. Art. 2B §§ 184-85, under which the Comptroller is empowered to promulgate regulations to enforce his duties under Maryland's alcoholic beverages article, the Comptroller in 1979 amended COMAR 03.02.01.06 to read, in relevant part, as follows:

> D. Standard of fill for containers of distilled spirits. Effective January 1, 1980, the standard of fill for distilled spirits shall be identical with those of the Bureau of Alcohol, Tobacco and Firearms. The only exception is that the 118 milliliters (¼ pint) is a permitted standard of fill in this State for intra-state purposes only.

Proposed, 6 Md. Reg. 1459 (September 7, 1979); adopted, 6 Md. Reg. 1838 (November 16, 1979). That Maryland regulation is still outstanding. Thus, presently Maryland permits (but does not require) use of 118 milliliter bottles for bottling and sale intrastate. Use of that bottle size afer January 1, 1980 is, however, prohibited in Maryland and elsewhere by 27 C.F.R. § 201.540b.[12]

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[12] Overbrook and Heublein argue that 27 C.F.R. § 201.540b prohibits the use only of quarter-pint bottles, and not of 118 milliliter bottles, for intrastate purposes. That argument is not tenable. The clear language of 27 C.F.R. § 201.540b discloses that the list of permissible sizes therein is exclusive. There is no exception for 118 milliliter bottles. It is true that 27 C.F.R. § 5.47(a) does not prohibit the intrastate use of 118 milliliter bottles or, for that matter, of quarter-pint bottles. Quarter-pint bottles are not on the list in 27 C.F.R. § 5.47(a), which pertains to interstate and foreign commerce and not intrastate commerce. However, 27 C.F.R. § 201.540(b) forbids the intrastate use of quarter-pint, and/or 118 milliliter bottles. Thus, pursuant to 27 C.F.R. § 5.47(a), the use of quarter-pint and 118 milliliter bottles is prohibited in interstate and foreign commerce; pursuant to 27 C.F.R.

Legal Questions

The primary issue posed in these cases is whether the federal government may, pursuant to the taxing power in the Federal Constitution, establish an exclusive list of bottle sizes and prohibit the use of all other bottle sizes even when the bottling and sale take place intrastate, and even when the state involved affirmatively desires to permit the use of one additional bottle size not included within the federal list. Paintiffs do not claim that the federal government may not *tax* the sale of the 118 milliliter bottles. Rather, plaintiffs claim that when the state desires to permit the bottling and sale of 118 milliliter bottles, within and only within that state's borders, the federal government may not prohibit such use.

The core of plaintiffs' argument is that section 2 of the Twenty-first Amendment prohibits the federal government, acting pursuant to the taxing power, from preventing the use of certain bottle sizes when the liquor is bottled solely for intrastate sale. There is little authority relating to the question of whether the Twenty-first Amendment restricts the exercise by the Congress of the taxing power. By way of contrast, it is to be noted that federal regulations, resting in part upon the commerce power, have been held to violate the Twenty-first Amendment when they conflict with state regulations. Wine Industry of Florida, Inc. v. Miller, 609 F.2d 1167 (5th Cir. 1980); Castlewood International Corporation v. Simon, 596 F.2d 638 (5th Cir. 1979).[13]

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[12] (Continued)
§ 201.540b, the use of such bottles is prohibited for all domestic purposes, including intrastate use, after January 1, 1980. The two regulations are consistent with each other: they apply the same bottle sizes to foreign, interstate and intrastate commerce, pursuant to different federal enactments and regulations.

[13] The challenged federal regulations in *Wine Industry* and *Castlewood* were both promulgated pursuant to 27 U.S.C. § 205(b), part of the FAA Act. Section 205(b) reads as folows:

In both *Castlewood* and *Wine Industry,* the Florida statutory provisions therein involved permitted but did

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[13] (Continued)

§ 205. Unfair competition and unlawful practices.

It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, or distilled spirits, directly or indirectly or through an affiliate:

(b) "Tied house". To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in *interstate or foreign commerce,* if such inducement is made in the course of *interstate or foreign commerce,* or if such person engages in the practice of using such means, or any of them, to such an extent as substantially *to restrain or prevent transactions in interstate or foreign commerce* in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in *interstate or foreign commerce*: (1) By acquiring or holding (after the expiration of any existing license) any interest in any license with respect to the premises of the retailer; or (2) by acquiring any interest in real or personal property owned, occupied, or used by the retailer in the conduct of his business; or (3) by furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money services, or other thing of value, subject to such exceptions as the Secretary of the Treasury shall by regulation prescribe, having due regard for public health, the quantity and value of articles involved, established trade customs not contrary to the public interest and the purposes of this subsection: or (4) by paying or crediting the retailer for any advertising, display, or distribution service; or (5) by guaranteeing any loan or the repayment of any financial obligation of the retailer; or (6) by extending to the retailer credit for a period in excess of the credit period usual and customary to the

not require certain intrastate conduct prohibited by the federal regulation. *Wine Industry* at 1172. The same is true in the within cases in which Maryland permits but does not require the use of the 118 milliliter bottle prohibited by federal regulation. *Castlewood, Wine Industry* and the within cases are to be contrasted with cases in which the state action *restricts* liquor transactions within the state which the federal action would permit.

In *Castlewood,* a federal regulation and a Florida statute were in conflict because the federal regulation effectually created a floor below which wholesale prices could not go even though prices below that level were "acceptable under the Florida scheme * * *." *Id.* at 641. Judge Fay, in opting for the Florida policy, wrote:

> Liquor occupies a unique postion among items of commerce insofar as the Commerce Clause is concerned. Its unique position is due to [section two of] the Twenty-first Amendment * * *.
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> * * * We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme. [*Id.* at 641-42]

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[13] (Continued)
industry for the particular class of transactions, as ascertained by the Secretary of the Treasury and prescribed by regulations by him; or (7) by requiring the retailer to take and dispose of a certain quota of any of such products; * * *. [Emphasis added.]
Thus, it appears that statutory provision was passed pursuant to the Congress' commerce power. *See* n. 8, *supra.* It also is to be noted that the Fifth Circuit panels in both *Wine Industry* and *Castlewood* treated the challenged federal regulations as though they had been promulgated pursuant to the commerce power exclusively. *See* 609 F.2d at 1170; 596 F.2d at 641.

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> Federal laws have prevailed over state regulation of intoxicating liquors in only two circumstances: 1) where the state regulation was repugnant to overriding national concern with due process and equal protection, and 2) where the state has sought to invade an area of exclusive federal concern, such as federally owned installations, regulation of commerce with foreign nations, and taxation of imports from foreign countries. Thus, absent a strong federal interest, the state scheme must prevail. • • • [*Id.* at 643; footnotes omitted.]

In *Wine Industry,* the Fifth Circuit again dealt with a conflict between a federal regulation and a Florida statutory provision, this time with regard to whether certain servicing by Florida distributors of Florida retailers was permissible. Again, the Fifth Circuit opted for Florida. In so doing, Judge Kravitch wrote (at 1170):

> Section two of the Twenty-first Amendment is hardly an often-litigated provision of the Constitution. There is, however, a small body of case law which has evolved around it. Typically, litigated cases under the Twenty-first Amendment involve state laws which are more restrictive than federal law. Indeed, the purpose of the Amendment was to permit "dry" states to regulate, to the point of exclusion, the flow of alcohol across their borders. [Citations omitted.] Accordingly, the Twenty-first Amendment protects a state which chooses to impose a burden on the sale of alcohol which would be impermissible under the Commerce Clause if the item burdened was not alcohol. [Citations omitted.]
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> This case presents what is essentially the inverse of the typical Twenty-first Amendment case;[14] here the Federal government has placed a burden on com-

[14] As indicated *supra,* the within cases also present that inverse question.

merce in alcohol which the state wishes to avoid. Analogous challenges were made to application of the Emergency Price Control Act of 1942 to the sale of liquor. In those cases, however, the contention was made that the Federal government is completely prohibited from legislating in the area of alcoholic beverages by the Twenty-first Amendment. Such challenges failed, but there did not appear to be any countervailing state legislation involved. *Old Monastery Co. v. United States,* 147 F.2d 904 (4th Cir.), *cert. denied,* 326 U.S. 734, 66 S.Ct. 44, 90 L.Ed. 437 (1945); *Jatros* v. *Bowles,* 143 F.2d 453 (6th Cir. 1944).

As indicated by the above quotations, *Wine Industry* and *Castlewood* both stressed the special nature of a state's power with regard to the handling of liquor within its borders and the impact of the Twenty-first Amendment upon the Commerce Clause. That Amendment has often been held to insulate state action from invalidation as violative of the commerce clause. In State Board of Equalization v. Young's Market Co., 299 U.S. 59, 62 (1936), Mr. Justice Brandeis held valid as authorized by the Twenty-first Amendment a California license fee for the privilege of importing beer brewed out of state, which "[p]rior to [that] Amendment * * * would obviously have been unconstitutional * * * [as] a direct burden on interstate commerce * * *." *See* Indianapolis Brewing Co. v. Liquor Control Commission, 305 U.S. 391, 394 (1939), in which Mr. Justice Brandeis held that Michigan, pursuant to the Twenty-first Amendment, could prohibit sale in Michigan of beer brewed in another state if that state discriminated against the sale of beer brewed in Michigan within such second state's borders; Carter v. Virginia, 321 U.S. 131 (1944), in which Mr. Justice Reed, speaking for a majority of the Court, held that Virginia could validly regulate liquor shipped from one state to another state through Virginia under its police power without offending the commerce clause, and in which Mr. Justice Frankfurter concurred only be-

cause of his perception of the effect of the Twenty-first Amendment.

Subsequently, in Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964), Mr. Justice Stewart, for a majority of the Court, held that despite New York's power under the Twenty-first Amendment to "regulate or control the passage of intoxicants through her territory in the interest of preventing their unlawful diversion into the internal commerce of the State," *id.* at 333, it could not "prevent transactions carried on under the aegis of a law pased by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations," *id.* at 334. The transactions involved in *Hostetter* were supervised by the federal Bureau of Customs and involved sales at Idlewild Airport of liquor "not delivered to the customer until he arrives at his foreign destination," *id.* at 325. In writing for the majority, Mr. Justice Stewart noted: "This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it *restricts* the importation of intoxicants destined for use, distribution, or consumption within its borders." *Id.* at 330 (emphasis added). Then, after citing to and reviewing a group of the Court's earlier opinions, the Justice wrote (*id.* at 331-32):

> To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* "repealed," then Congress would be left with no regulatory over interstate or foreign commerce in intoxicating liquor.
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> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution.

> Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

Joseph E. Seagram & Sons v. Hostetter 384 U.S. 35 (1966), involved certain New York State liquor police statutory provisions. Writing therein, Mr. Justice Stewart commented upon his earlier decision as follows (*id.* at 42-43):

> Unlike *Idlewild*, the present case concerns liquor destined for use, distribution, or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude for regulation by the State. We need not now decide whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause. * * * It will be time enough to assess the alleged extraterritorial effects of [the New York statute] when a case arises that clearly presents them. * * *

In addition, *see* Craig v. Boren, 429 U.S. 190, 206 (1976); Heublein, Inc. v. South Carolina Tax Comm'n, 409 U.S. 275, 283 (1972); Vintage Imports, Ltd. v. Joseph E. Seagram & Sons, Inc., 409 F. Supp. 497, 506-07 (E.D. Va. 1976); National Railroad Passenger Corp. v. Miller, 358 F. Supp. 1321, 1327 *et seq.* (D. Kan.) (three-judge court), *aff'd mem.*, 414 U.S. 948 (1973); Epstein v. Lordi, 261 F. Supp. 921, *et seq.* (D. N.J. 1966) (three-judge court), *aff'd mem.*, 389 U.S. 29 (1967). *Cf.* McCormick & Co. v. Brown, 286 U.S. 131, 140-41 (1932), in which Mr. Chief Justice Hughes, construing the Eighteenth Amendment and certain federal and state statutory provisions, held that, prior to the enactment of the Twenty-first Amendment, West Virginia could requre nonresident manufacturers and wholesale dealers to pay for and

obtain licenses before shipping certain products into the state.[15]

In a number of cases, the Twenty-first Amendment has *not* prevented invalidation of state laws or actions, when the state actions were challenged as violative of provisions of the federal Constitution other than the commerce clause or as inconsistent with federal laws enacted pursuant to constitutional powers other than those set forth in the commerce clause. In Craig v. Boren, *supra*, Oklahoma statutory provisions prohibiting sale of 3.2% beer to males younger than 21 years and to females younger than 18 were invalidated as gender-based discrimination against males in violation of equal protection principles. Mr. Justice Brennan rejected the contention that the Twenty-first Amendment protected the challenged Oklahoma statutes from such equal protection attack and wrote (429 U.S. at 206): "This Court's decisions * * * have confirmed that the [Twenty-first] Amendment primarily created an exception to the normal operation of the Commerce Clause. [Citations omitted.] * * * Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." In addition, *see* Department of Revenue v. James B. Beam Distilling Co. 377 U.S. 341 (1964) (re Export-Import Clause); Women's Liberation Union of Rhode Island v. Israel, 512 F.2d 106, 107 (1st Cir. 1975). In *Women's Liberation Union*, the First Circuit held that a Rhode Island liquor license classification violated equal protection principles in a sex discrimination context. In that case, Judge Coffin wrote (at 108):

> Appellants contend that the district court, in finding the classification established by § 3-8-5 not

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[15] In *McCormick*, the Chief Justice emphasized the importance of certain pre-Eighteenth Amendment federal statutory provisions. 286 U.S. at 140-41. In Craig v. Boren. 429 U.S. at 205-06, Mr. Justice Brennan stated that the Commerce Clause framework established under those statutes."

rationally related to a legitimate state purpose, too narrowly construed the regulatory powers reserved to the states by the Twenty-first Amendment to the Constitution. The Supreme Court in California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), approved a regulation prohibiting the presentation in bars of sexually explicit entertainment, some aspects of which the Court conceded would have been protected by the First Amendment in another context. The Court reviewed the cases in which it had recognized the Twenty-first Amendment as ". . . conferring something more than the normal state authority over public health, welfare, and morals", 409 U.S. at 114, 93 S.Ct. at 395 and noted that "[t]hese decisions did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations." *Id.* at 115, 93 S.Ct. at 395. The Court concluded that in the light of powerful evidence that prostitution, rape, and assault on police officers proliferated in and around bars presenting sexually explicit entertainment, the state's determination that such entertainment should be prohibited in establishments licensed to serve intoxicating beverages was not "irrational". *Id.* at 116, 93 S.Ct. 390. *LaRue,* while it reiterates the proposition long embraced by the Court that the states have broad powers to regulate the sale of liquor, does not release the states from the requirement that the objective of the regulation be permissible, and that the means selected be rationally related to the end to be achieved.[16]

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[16] *And see* Wisconsin v. Constantineau, 400 U.S. 433 (1971), in which in the course of holding a Wisconsin statute regulating sale or gifts of liquor invalid as violative of procedural due process, Mr. Justice Douglas wrote (at 436):

> We have no doubt as to the power of a State to deal with the evils described in the Act. The police

In Craig v. Boren, *supra,* Mr. Justice Brennan wrote of *LaRue* as follows (at 207):

> It is true that *California* v. *LaRue,* 409 U.S. 109, 115 (1972), relied upon the Twenty-first Amendment to "strengthen" the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performances "partake more of gross sexuality than of communication," *id.,* at 118. Nevertheless, the Court has never recognized sufficient "strength" in the Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause.

In Old Monastery Co. v. United States, 147 F.2d 905 (4th Cir.), *cert. denied,* 326 U.S. 734 (1945), and also in Jatros v. Bowles, 143 F.2d 453 (6th Cir. 1944), both of which are cited *supra* at p. 15 in the quotation from *Wine Industry,* the challenged federal actions were apparently upheld entirely or in large part because of the applicability of the war power. In *Jatros* (at 455), Judge Simons stated that "[n]either expressly nor by implication was the war power abrogated or limited by the Twenty-first Amendment.[17]

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[16] (Continued)

> power of the States over intoxicating liquors was extremely broad even prior to the Twenty-first Amendment. * * *

[17] Writing in *Old Monastery* (at 907), Judge Dobie stressed the following comments in *Jatros* which are seemingly relevant with regard to the commerce clause itself:

> Equally strong are the words of Circuit Judge Simons in Jatros v. Bowles, 6 Cir., 143 F.2d 453, 455: "Followed to its logical conclusion, the appellant's construction, if valid, would mean that the federal government no longer has power to punish theft of intoxicants from interstate shipments of alcoholic beverages under the authority of the so-called Car Seal Act, nor to regulate or prohibit unfair trade

Petitioner argues that the twenty-first amendment has transferred to the states "complete and exclusive control over commerce and traffic in intoxicating beverages unlimited by the commerce clause" and has deprived Congress of its power under the Constitution to enact the present statute as a regulation of interstate commerce in intoxicating liquors.

Section 2 of the twenty-first amendment gives effect to any and all state laws prohibiting the transportation or importation of intoxicating liquors into a state in violation of the laws thereof. But there is no provision in the amendment which purports to restrict the power of Congress over commerce in intoxicating liquors when such commerce is carried on without the violation of state laws, or to deny to Congress the power to legislate in aid of the state prohibitions. * * *

We are of the opinion that the enactment of the Federal Alcohol Administration Act was a valid exercise by Congress of its constitutional powers to regulate interstate and foreign commerce and *to protect the revenue* * * *. It is not necessary that the Act as a whole rest upon a single power of Congress; and according to the language of Sec. 3 of the Act (27 U.S.C.A. § 203) Congress was exercising its power *to protect the revenue* derived from distilled spirits, wine, and malt beverages, to regulate interstate and foreign commerce, to enforce the postal

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[17] (Continued)

practices in respect to such commodities through the Federal Trade Commission, nor to regulate tariffs through orders of the Interstate Commerce Commission, nor to prohibit unfair labor practices affecting commerce in intoxicants by brewers or distillers under the authority of the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., nor to prescribe minimum wages or maximum hours for employees in such enterprises under the authority of the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq. *These implications demonstrate the tenuousness of the appellant's broad contentions.*" [Italics in original.]

laws in respect thereto, and to enforce the twenty-first amendment.

* * * The power to regulate production of intoxicating liquors for the purpose of protecting revenue is not detracted from by the twenty-first amendment, but is, in fact, supplemented thereby. Under the twenty-first amendment Congress may authorize regulations affecting production for the purpose of making effective the protection which the twenty-first amendment gives to the states even though such regulations may not contribute to the protection of the revenue.

Petitioner urges that the Act seeks to regulate purely intrastate transactions through the device of granting permits which cover all the production activities which ordinarily are considered intrastate * * *. Whether the provisions of the Act requiring one to receive a permit before engaging in the operations of rectifying, distilling, and bottling would be invalid as applied to one who engages in those operations solely and strictly for purposes of intrastate trade need not be considered in deciding this case since petitioner admittedly is engaged in interstate commerce. Petitioner owns and operates its plan in Illinois where it receives shipments of distilled spirits which are distilled outside the state of Illinois and which petitioner rectifies, blends and warehouses and bottles for transportation and wholesale to customers outside of Illinois. [Footnotes omitted; emphasis added.][18]

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[18] In Hanf v. United States, 235 F.2d 710 (8th Cir.), *cert. denied,* 352 U.S. 880 (1956), defendant challenged his conviction for failing to keep and file proper records of his activities as a liquor wholesaler on the ground that "[w]hile the persons and firms from whom he purchased distilled spirits were engaged in interstate commerce, his purchases from them were made entirely within the State of Minnesota and his sales were only to buyers within the State of Minnesota." *Id.* at 716. The Eighth Circuit upheld the constitutionality of the federal statute involved, in the face of the defendant's attacks under the Twenty-first Amendment and otherwise.

In the within cases, as opposed to the situation in *Arrow Distilleries*, the ultimate sales of bottled liquor are only to customers within, not outside of, Maryland. But the bottling within Maryland of liquor produced in Connecticut and shipped to Maryland prior to bottling involves interstate activity which is relevant to the collection of the revenue by the federal authorities. Thus, in these cases, as in *Arrow Distilleries*, it is unnecessary to reach the question of whether the taxing power can be exercised with respect to what are *entirely* intrastate transactions.

The issue posed in these cases does not involve the invalidation of any state action, whether because of conflict with federal action or otherwise. What *is* involved herein is the validity of a federal prohibition against doing something the state desires to permit. Even assuming, *arguendo* only, that if that federal prohibition were grounded on the exercise of the commerce power, it would violate the state's authority under the Twenty-first Amendment, there is no authority for holding that that Amendment restricts the otherwise valid exercise of the taxing power by the federal government to prevent something a state desires to permit.[19]

That brings us to plaintiffs' further contentions that 27 C.F.R. § 201.540b, as a tax regulation, is invalid because it will be of no assistance in collecting liquor taxes, that it bears no reasonable relation to the protection of the revenue, and that there is therefore no statutory authority for its promulgation.

The burden on a party seeking to invalidate a tax regulation as unreasonable is a heavy one. A court

> do[es] not sit as a committee of revision to perfect the administration of the tax laws. Congress has delegated to the Commissioner, not to the courts, the task of prescribing "all needful rules and regula-

[19] It is to be noted that no challenge is made herein to the procedure pursuant to which the federal regulations at issue were promulgated.

> tions for the enforcement" of the Internal Revenue Code. 26 U.S.C. § 7805(a). In this area of limitless factual variations, "it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments." [Citation omitted.] The role of the judiciary in cases of this sort begins and ends with assuring that the Commissioner's regulations fall within his authority to implement the congressional mandate in some reasonable manner. * * *

United States v. Correll, 389 U.S. 299, 306-07 (1967). In Noble Motor Company v. United States, 231 F. Supp. 702, 708 (D. Md. 1964), Judge Winter, then a district judge, wrote that "[o]ne who insists that a [tax] regulation is invalid '* * * must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that not at all appropriate to the end specified in the act of Congress,' * * *."

The burden is particularly heavy where, as here, the statutory authority for the regulation and the regulation itself have been in existence since 1934, and where the statutory authority for the regulation has been reenacted by Congress. In United States v. Correll, *supra* at 305-06, Mr. Justice Stewart, in speaking of a tax regulation, quoted an earlier tax case for the

> settled principle that "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." [Citation omitted.]

See NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974).

In Felsenheld v. United States, 186 U.S. 126 (1902), the Supreme Court dealt with the power of the federal government to promulgate regulations under the taxing power. Plaintiff in *Felsenheld* challenged a regulation issued by the Commissioner of Internal Revenue which

forbade the inclusion of anything other than tobacco in a tobacco package. Plaintiff wished to include a coupon in its packages. The coupon was weightless, and thus its inclusion could "not affect, in any way, the ascertaining of the proper tax payable upon the package or interfere in any way with the collection of such tax." *Id.* at 131. Nevertheless, the coupons came within the purview of the prohibition of the regulation, and their inclusion in the packages was forbidden by it. In upholding the validity of the regulation, Mr. Justice Brenner spoke as follows (*id.* at 131-33):

> In the internal revenue legislation Congress has not simply prescribed that certain articles shall pay a tax, but has provided a series of rules and regulations for the manufacture and sale of such articles, including therein directions as to the size and form of packages, and such other matters as in its best judgment were necessary or advisable for the purposes of effectually securing the payment of the tax imposed. Now the contention is that the courts may supervise this system of rules and regulations, and if they find a provision which, in their judgment, in no way secures or facilitates the proper collection of the tax they may strike it down as something beyond the power of Congress. It is said that the only matter in which the National Government is concerned is the tax * * *.
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> * * *
>
> It seems to us that, in the rules and regulations for the manufacture and handling of goods which are subjected to an internal revenue tax, Congress may prescribe any rule or regulation which is not in itself unreasonable * * *. Congress may rightfully make the prohibition [against inclusion of items other than tobacco in tobacco packages] absolute and the courts may not draw a line between the foreign substance, which is trifling in size and weight, and that which is of appreciable size and weight, and

hold in reference to a particular package the act valid if the size or weight is appreciable and invalid if it is not.

Among the regulations prescribed by Congress in its internal revenue legislation are many which are purely arbitrary, or at least the necessity of which for the collection of taxes is not apparent. For instance, Congress has directed (Rev. Stat. 3392) that cigars shall be put up in boxes containing twenty-five, fifty, one hundred, two hundred and fifty, or five hundred each. There is no special efficacy in either [sic] of these numbers. Boxes containing fifteen, thirty, or sixty cigars would apparently afford just the same facilities for taxation, and yet can there be a doubt that Congress may make such a rule and compel each manufacturer to abide thereby? It has a right to select, and when it has made a selection, although there may be no special reasons for the specific numbers, and they are in fact arbitrarily selected, it may for purposes of uniformity compel compliance with the rule. So, if it should prescribe that at least nine tenths of every package, purporting to be a package of a particular kind of tobacco, and subject to a special tax, should be that particular kind of tobacco, would the manufacturer be permitted to make one third of the contents of some other kind of tobacco or any other substance? The proportion might be arbitrarily selected, it is true, but is it not clearly within the power of Congress in its regulations to make such arbitrary selection? And if it may say that not less than nine tenths of the contents shall be that particular tobacco, the subject of the tax, is it any the less within the power of Congress to prescribe that there shall be nothing in the package save that tobacco?

Indeed, the admission that the Government may require that the contents of a package shall be partly of the goods which it taxes is a concession that it may also require the entire contents to be such goods.

In the within cases, defendants do not argue that the use of certain sizes protects the revenue while the use of others would not. Rather, defendants indicate that restriction of standards of fill to certain sizes will "ensure that legal liquor bottles are easily recognizable by their sizes, brandings, and markings. * * * [T]he Treasury Department * * * continues to believe, that in order to protect the revenue, it is necessary to have a limited number of consistent and uniform sizes."[20]

Plaintiffs contend that, since the tax is applied to proof gallons of liquor prior to the liquor being placed

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[20] Defendants' Memorandum of Law in Support of Motion for Judgment on Agreed Statement of Facts, at 25, filed December 26, 1979. During a hearing in these cases on January 14, 1980, this Court asked counsel for the State of Maryland the following question: "Suppose * * * today you were asking not for just one additional size bottle but for a thousand different sized bottles. * * * The legal issue would be exactly the same, wouldn't it?" Counsel responded that the legal issue would be the same. This Court then asked: "If the federal government had to deal with one thousand more different sized bottles, it would make it more difficult to check back [for proper tax payments], wouldn't it " Counsel responded: "I have to concede that." Counsel then argued that in these cases the parties seek authorization to use only one additional bottle size, and not one thousand, and that the use of only one additional bottle size could not substantially jeopardize the protection of the revenue. However, the fact that these cases involve only one additional bottle size is not determinative. As counsel stated. the same legal argument would apply were the plaintiffs seeking to use one thousand additional bottle sizes, and not just one: if this Court were to permit the use of 118 milliliter bottles in these cases, the reasons for so doing could be equally applicable in future cases in which other plaintiffs sought to use one or more additional bottle sizes.

in individual bottles, the regulation of bottle sizes bears no reasonable relationship to the protection of the revenue. The Secretary, however, has determined that the regulation of bottle sizes will assist him in protecting the revenue. Beginning January 1, 1980, liquor is to be taxed either in bulk or in the bottle, and not just in bulk as it was immediately prior to that date. "As of January 1, 1980, * * * the Secretary's regulation of liquor containers will also protect the revenue by facilitating accurate tax computation." Defendants' Memorandum at 17. Thus, if liquor is bottled only in bottles of specific sizes, that will assist the Government in calculating and checking the tax due upon liquor in the bottle, even though the tax rate will still apply to proof gallons.[21]

Additionally, it is to be noted that if the challenged regulation is invalid because the tax is determinable before the liquor is bottled, then 26 U.S.C. § 5301(c) would be invalid as applied to tax-paid liquor. That section contains a federal prohibition against placing in liquor bottles "any distilled spirits whatsoever other than those contained in such bottle at the time of stamping." If plaintiffs' said approch is correct, it would require the conclusion that the reach of 26 U.S.C. § 5301(c) would need to be restricted to distilled spirits upon which no tax had yet been paid. Such placing of tax-paid liquor in bottles could then not be forbidden under the taxing power because the revenue would not be endangered by such conduct. However, all courts which have spoken on the subject since the amendment of 26 U.S.C. § 5301(c) in 1958 have concluded that 26 U.S.C. § 5301(c) applies to *all* liquor, whether tax has been paid on it or not. *See* Watts v. United States, 352 F.2d 803 (9th Cir. 1965); Stilinovic v. United States, 336 F.2d 862 (8th Cir. 1964). In those two cases, the application of the statute to tax-paid liquor, as well as to non-tax-paid liquor, was upheld. In *Stilinovic*, the Court (at 864)

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[21] *See* the Distilled Spirits Tax Revision Act of 1979, Title VIII of P.L. 96-39, 96th Cong., 1st Sess.

relied in part upon Felsenheld v. United States, 186 U.S. 126 (1902).[22]

Defendants' challenge herein is also mounted upon the argument that what is involved is regulation of commerce disguised as taxation. It is true that regulations designed to facilitate collection of taxes and to protect the revenue may often have an effect upon commerce. The within cases do not involve a situation in which a tax was adopted primarily for the purpose of regulation, but rather a situation in which a regulation was adopted for the purpose of protecting the revenue and facilitating the collection of taxes. The fact that a particular federal action which rests upon the taxing power affects commerce creates in and of itself no constitutional or other problem.[23]

Moreover, even if a tax is adopted in order to regulate, which is hardly the situation herein, "a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed." United States v. Sanchez, 340 U.S. 42, 44 (1950). *See also* United States v. United States Industrial Alcohol Co., 103 F.2d 97, 100 (4th Cir. 1939).

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[22] In Hanf v. United States, 235 F.2d 710, 719 (8th Cir.), *cert. denied*, 352 U.S. 880 (1956), the Eighth Circuit noted that it had earlier "held that a[n earlier version of 26 U.S.C. § 5301(c)] regulating the refill of liquor bottles was reasonably related to the protection of the revenue * * *."

[23] *See* Hanf v. United States, 235 F.2d 710, 718-19 (8th Cir.), *cert. denied*, 352 U.S. 880 (1956): "The control of intrastate liquor business by the federal government is not unique. There are many familiar examples of incidential control of certain activities normally beyond Congressional reach. [Citations omitted.] The power to regulate interstate commerce is not the only ground for sustaining the constitutionality of the Federal Alcohol Administration Act." The other ground in *Hanf* was the taxing power.

Whether this Court, if it were the Congress, or if it were the Secretary of the Treasury acting pursuant to powers bestowed upon him by the Congress, would enact legislation or promulgate a tax regulation outlawing the size bottle which plaintiffs, for reasons quite understandable from their point of view, desire to utilize is of no import whatsoever. This Court is not empowered to set aside the regulation attacked by plaintiffs herein once it determines, as it has *supra*, that that regulation passes muster despite the Twenty-first Amendment, and once this Court also determines that that regulation is reasonably related to the collection of the revenue. Plaintiffs' within challenge should be directed to the Secretary and/or to the Congress. Either has the discretionary power to withdraw or amend the challenged regulation. By contrast, this Court does not possess such power.

For the reasons set forth *supra*, judgment will be entered for defendants.[24]

United States District Judge

[24] Plaintiffs in Civil No. K-79-2164 have indicated that they will be irreparably harmed if this Court permits the challenged federal regulation to take effect and if thereafter the Fourth Circuit and/or the Supreme Court grants to plaintiffs the relief which this Court holds herein plaintiffs are not entitled to obtain. Accordingly, the effect of the within opinion and of the Order being entered today in accordance therewith shall be stayed until March 4, 1980 to enable plaintiffs to file a motion to stay under Federal Civil Rule 62(c). If plaintiffs so do, that stay shall further continue in effect until this Court grants or denies the said Rule 62(c) motion. If plaintiffs file such a motion on or before March 4, 1980, defendants shall respond and plaintiffs shall rebut in accordance with the time provisions of Local Rule 6.

APPENDIX E

FEDERAL STATUTES

26 U.S.C. §5301(a):

> (a) Requirements.—Whenever in his judgment such action is necessary to protect the revenue, the Secretary or his delegate is authorized, by the regulations prescribed by him and permits issued thereunder if required by him—
>
> > (1) to regulate the kind, size, branding, marking, sale, resale, possession, use, and reuse of containers (of a capacity of not more than 5 wine gallons) designed or intended for use for the sale of distilled spirits * * *.

26 U.S.C. §5301 was first approved by Congress on June 18, 1934, in the form of House Joint Resolution 370 (48 Stat. 1020), which states.

> *"To protect the revenue by regulation of the traffic in containers of distilled spirits.*
>
> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled That whenever in his judgment such action is necessary to protect the revenue, the Secretary of the Treasury is authorized, by the regulations prescribed by him, and permits issued thereunder if required by him (1) to regulate the size, branding, marking, sale, resale, possession, use and re-use of containers (of a capacity of less than five wine gallons) designed or intended for use for the sale at retail of distilled spirits (within the meaning of such term as it is used in title II of the Liquor Taxing Act of 1934) for other than industrial use, and (2) to require, of persons manufacturing, dealing in, or using any such containers, the submission to such inspection the keeping of such records, and the filing of such reports as may be deemed by him reasonably necessary in connection therewith. Whoever willfully violates the provisions of any regulation prescribed,

or the terms or conditions of any permit issued, pursuant to the authorization contained in this joint resolution and any officer, director, or agent of any corporation, shall, upon conviction, be fined not more than $1,000.00 or be imprisoned for not more than two years, or both; and, notwithstanding any criminal conviction, the containers involved in such violation shall be forfeited to the United States, and may be seized and condemned by like proceedings, as those provided by law for forfeitures, seizures, and condemnations for violations of the internal revenue laws, any such containers so seized and condemned shall be destroyed and not sold. Any requirements imposed under this joint resolution shall be in addition to any other requirements imposed by, or pursuant to, existing law, and shall apply as well to persons not liable for tax under the internal revenue laws as to persons so liable."

The preamble to 27 U.S.C. §205 and 205(e) of the Federal Alcohol Administration Act entitled "Labeling" are set forth below:

"§205. Unfair competion and unlawful practices. It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, or distilled spirits, directly or indirectly or through an affiliate:
* * *"

"(e) Labeling. To sell or ship or deliver for sale or shipment or otherwise introduce into interstate or foreign commerce, or to receive therein or to remove from consumer's custody for consumption, any distilled spirits, wine or malt beverages in bottles, unless such products are bottled, packaged and labeled in conformity with such regulations to be proscribed by the Secretary of the Treasury with respect to packaging, marking, branding and labeling and size and fill of container."

APPENDIX F

MARYLAND REGULATION

Pursuant to Md. Ann. Code. Art 2B §§184-185, under which the Comptroller is empowered to promulgate regulations to enforce his duties under Maryland's alcoholic beverages article, the Comptroller in 1979 amended COMAR 03.02.01.06 to read, in relevant part, as follows:

> "D. Standard of fill for containers of distilled spirits. Effective January 1, 1980, the standard of fill for distilled spirits shall be identical with those of the Bureau of Alcohol, Tobacco and Firearms. The only exception is that the 118 milliliters (¼ pint) is a permitted standard of fill in this State for intrastate purposes only."

FEDERAL REGULATIONS

Amended 27 C.F.R. §5.47(a) adopted pursuant to 27 U.S.C. 205(a):

> "*Authorized standards of fill.* On or after January 1, 1980, the standards of fill for all distilled spirits, whether domestically bottled or imported, shall be as follows:
>
> | | |
> |---|---|
> | 1.75 liters | 500 milliliters |
> | 1.00 liter | 200 milliliters |
> | 750 milliliters | 50 milliliters " |

27 C.F.R. §201.540b

The regulation at the core of the dispute in the within cases is 27 C.F.R. §201.540b, which provides in relevant part:

"Liquor bottles shall conform to the applicable standards of fill provided in Subpart E of 27 C.F.R. Part 5, including those for liquor bottles of less than 200 ml. capacity. The use of any bottle size other than as authorized in Subpart E of 27 C.F.R. Part 5 is prohibited for the packaging of distilled spirits for domestic purposes, except that 4-ounce liquor bottles may be used through December 31, 1979, for packaging any distilled spirits, other than spirits bottled in bond after determination of tax, on bottling premises for sale in intrastate commerce only."